

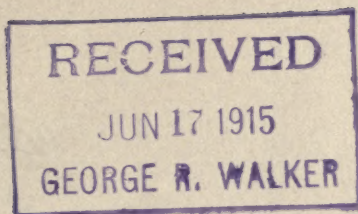


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HARVARD  
LAW REVIEW

VOL. XXIII.

1909-1910



CAMBRIDGE, MASS.  
THE HARVARD LAW REVIEW ASSOCIATION  
1910



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# HARVARD LAW REVIEW.

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VOL. XXIII.

NOVEMBER, 1909.

NO. 1.

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## WHAT LAW GOVERNS THE VALIDITY OF A CONTRACT.

NO topic of the Conflict of Laws is more confused than that which deals with the law applying to the validity of contracts. More than one cause is responsible for this confusion. In the first place the problem itself has not been clearly thought out and distinguished from similar problems by lawyers and judges. In passing upon a contract it may be important to determine whether the agreement in question has ever come into existence as a binding contract, or what its nature is; it may be desired to determine whether the obligation has been performed, or what has been the effect of its performance or non-performance; and finally it may be in question whether a certain remedy can be had for its breach. It is obvious that a different law may be applicable to the creation of a contract from that applicable to its performance; and it is certainly the case that all questions involving the remedy are differently governed from questions involving the obligation and performance. Courts and writers, however, often lay down broadly, as a general rule, a principle which is meant to apply to one or the other of these cases and not to all. A striking example of this sort of confusion is found in Judge Story's treatment of the subject. At the outset he lays it down as a general principle that a contract is governed by the law of the place of making.<sup>1</sup> Later in his treatment of the topic he states that this general principle is confined to cases where contracts are made and to be per-

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<sup>1</sup> § 242 (1 ed., 1834).

formed in the same place, and that where the place of performance differs from the place of making the rule is a different one.<sup>1</sup> This method of treating the subject would naturally lead to confusion; and indeed it has been responsible for a large proportion of the conflict of authority. Yet it is clear that in the first section he meant merely to point out that the law of the forum did not apply to the obligation of a contract made elsewhere, and that no question of place of performance was involved; while on the other hand, his second statement was applicable to a case where the place of making and performance were different, and no point was made of the place of suit. In other words, his first statement amounts to saying that the law of the forum does not apply to the right; his second, to saying that the law of the place of performance governs the validity. He however puts it as if by the general rule the law of the place of making governs, subject to an exception; and he did not expressly point out the fact that the rules he laid down were applicable to entirely distinct problems. As a result, the confusion of thought which has been mentioned has been accentuated by the citation of his authority on the one side or the other in cases to which his language ought not to be applied.

The confusion of the law, however, is only partly due to a lack of clearness in distinguishing between the different cases that may arise. Even where the point involved is clearly in mind, the decisions themselves are greatly confused. Several entirely distinct rules have been laid down for determining the validity of a contract, and each of these rules is supported by authority. If, in any particular jurisdiction, only one of these rules were adopted we should have the not uncommon case of a difference between jurisdictions on a point of law. Unfortunately, however, many jurisdictions in the United States have been unusually hospitable to the different rules. We find irreconcilable principles laid down in the decisions of the same jurisdiction; and not infrequently several irreconcilable doctrines propounded in the same case as undoubted statements of general rules of law. It is in this respect that the confusion of authority on the point is unusual. Perhaps the most striking example of this conflict of authority is afforded by two cases in the Supreme Court of the United States: *Scudder v. Union Bank*<sup>2</sup> and *Hall v. Cordell*.<sup>3</sup> In the first case a parol acceptance had been given in Illinois for a bill drawn in

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<sup>1</sup> § 280.

<sup>2</sup> 91 U. S. 406 (1875).

<sup>3</sup> 142 U. S. 116 (1891).



Illinois and payable in Missouri. In the second case an oral acceptance had been given in Missouri for a bill drawn in Missouri and payable in Illinois. By the law of Illinois an oral agreement to accept was binding; by the law of Missouri it was not. In the first case, the court held that the law of the place of making the contract must govern, and that therefore as the contract was made in Illinois it was a valid one. In the second case, the court held that the law of the place of performance must govern, and that therefore the law of Illinois the place of performance made the obligation valid. The court in the second case was not ignorant of the earlier decision, for it cited it as authority that the law of Illinois made such a parol acceptance valid; and yet the court apparently did not notice that its decision was directly opposed on the point of conflict of laws to that in the earlier case. It is not often, of course, that so glaring a contradiction is found in the cases of the same jurisdiction. The acceptance of two different and opposed principles on this point is usually made possible by the application of the principles in different classes of cases. It is not uncommon, for instance, for a court to lay down one principle in cases of commercial paper, and an entirely different principle in cases of contract of carriage, without noticing that in substance the same point is really involved in both classes of cases.

In order to avoid a confusion as to the subject of discussion, let us limit our consideration to cases where the question in doubt is the nature or the validity of a contractual obligation. Questions concerning performance are not here to be considered, and so far as possible the authorities cited will be cases in which the validity or nature of the obligation was in question; although it is not always possible to distinguish the cases, as the courts themselves have not usually made the distinction.

A distinction has been suggested between the form required for contracting and the substantial requirements for a binding contract; or to use Professor Dicey's phrase,<sup>1</sup> between the formal validity and the essential validity of a contract. This is a well-recognized distinction in the Civil Law of Europe. A difference might doubtless be made in our law between the form which an act must take and the effect of the act in creating a legal obligation; but as a matter of fact decisions in courts of common law have seldom turned on this difference. Without further considering this question I shall concern my-

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<sup>1</sup> Dicey, *Conf. Laws*, 2 ed., pp. 540, 545.

self principally with the essential rather than the formal validity of the contract, and so far as it is possible to do so shall omit the authorities which deal merely with the question of formal validity. A distinction has also been made between the capacity of parties to contract and the binding obligation of their agreement. Here again I shall not consider questions of capacity except so far as the courts have made it impossible to distinguish.<sup>1</sup>

In dealing with this topic I propose to consider first the origin and history of the present doctrine, and second, the condition of authority in the various common-law jurisdictions. I shall then proceed to criticise the various doctrines; pointing out what, as it seems to me, is the true solution of the problem.

## I.

### THE ORIGIN AND HISTORY OF THE DOCTRINE.

The first case in which the question was considered and the case which has furnished authority for all subsequent discussions, is the case of *Robinson v. Bland*.<sup>2</sup> This was an action of *assumpsit* in three counts: first, on a bill of exchange, drawn by the defendant's intestate upon himself in France and payable in England, and accepted by the intestate; second, money lent in France to the intestate; third, money had and received in France by the intestate to the use of the plaintiff. The plaintiff had lent to the intestate in Paris £300, which the intestate then and there lost to the plaintiff at play, together with £372 more; and the bill of exchange was given for the whole amount. It was found that "in France, money lost at play, between gentlemen, may be recovered as a debt of honor, before the marshals of France, who can enforce obedience to their sentences by imprisonment; though such money is not recoverable in the ordinary course of justice. That money lent to play with, or at the time and place of play, may be recovered there, as a debt, in the ordinary course of justice"; and that both the plaintiff and the intestate were gentlemen. The case was twice argued in the King's Bench, and was finally decided by a court consisting of Lord Mansfield, C. J., and

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<sup>1</sup> It does not seem theoretically possible, on the principles of the common law, to support these distinctions; but that is another story.

<sup>2</sup> 2 Burr. 1077; 1 W. Bl. 234, 256 (1760).



Denison and Wilmot, JJ. The court held unanimously that the bill of exchange was void, and that the money lost at play could not be recovered; but that the money lent could be recovered. Two of the judges agreed upon a reason for their decision, viz., that the law of France and the law of England were identical on all these points.<sup>1</sup> The judges, however, all expressed their views on the question which law would prevail if the laws of France and of England were different. Mr. Justice Denison expressed the opinion that the English law would prevail, since the plaintiff had chosen England as his forum and must therefore be bound by the English law.<sup>2</sup> Mr. Justice Wilmot asserted that where recovery was against the policy of the forum there could be no recovery, and on this ground he should "incline" that the law of England should prevail, but he gave no opinion on that point; and he also mentioned, as a strong reason for recovery for money lent, the fact that it was payable in England. He placed his decision, however, on the ground that the laws were the same. Lord Mansfield, having pointed out that the laws were the same, and therefore no question arose as to which law should govern, added two reasons for applying the English law: "First, the parties had a view to the laws of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed (citing Huberus and Voet). Now here, the payment is to be in England; it is an English security, and so intended by the parties." Second, the payment was to be in England, and "in every disposition or contract where the subject-matter relates locally to England the law of England must govern, and must have been intended to govern."

It will be seen that the three judges expressed four possible views

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<sup>1</sup> Lord Mansfield: "The facts stated scarce leave room for any question; because the law of France and of England is the same." "As to the money won, the contract is to be considered as void by the law of France, as well as by the law of England; which makes it unnecessary to consider how far the law of France ought to be regarded." "As to the money lent, the plaintiff is entitled to it, both by the law of England and by the law of France." Wilmot, J.: "Whether an action can be supported in England, on a contract which is void by the law of England, but valid by the law of the country where the matter was transacted, is a great question (though I should have no great doubt about that). But that case does not exist here. . . . The laws of France and of England are the same, as to the money won." "As to the money lent: there can be no doubt; because there is no law either in England or France that hinders the plaintiff from maintaining his action on it." Denison, J., however expressed no opinion on this point.

<sup>2</sup> "The plaintiff has appealed to the laws of England by bringing his action here, and ought to be determined by them."

as to the law which should govern in case of difference: the law of the forum; the law of the place of performance; the law intended by the parties; the law of the place of performance as that presumably intended by the parties. If these are to be regarded as rules of law, they are mutually destructive; if either is the rule, the others cannot be. It will further be seen that these expressions of the judges are mere *dicta*, and that the majority of the court expressly pointed out that fact.

It will further be noticed that these expressions were uttered on the supposition that the contract was valid where made. The court was not suggesting that a contract void where made could be upheld on the ground that it was made with a view to another law by which it would be valid. And a few years later the same court held that a note made in Jamaica and payable in London could not be enforced in England if it was invalid by the law of the country where it was made.<sup>1</sup>

The *dicta* in *Robinson v. Bland* were not greatly considered in England for a hundred years after the decision; and most of the *dicta* had been rejected in well-considered cases. (1) The court refused to apply the law of the forum in *Quarrier v. Colston*.<sup>2</sup> (2) The court refused to apply the law of the place of the subject-matter of the contract in *Stapleton v. Conway*.<sup>3</sup> (3) The court refused to presume the intent of the parties to submit their contract to the law of the place of performance, and on the contrary asserted that they must be presumed to submit to the law of the place of making, in *Peninsular and Oriental Steam Navigation Co. v. Shand*.<sup>4</sup>

But Lord Mansfield's first reason for preferring the law of England — that it was the law intended by the parties — has never been repudiated by an English court, and has finally been accepted as the rule by which the validity of all contracts is to be decided.<sup>5</sup>

<sup>1</sup> *Alves v. Hodgson*, 7 T. R. 241 (1797).

<sup>2</sup> 1 Phillips 147. Action to recover money lent in Germany to be used in gambling. Recovery allowed, as permitted by the German law, though not by the English law.

<sup>3</sup> 3 Atk. 727. Mortgage in England of a plantation in the West Indies; interest reserved at a rate invalid in England, but valid in the West Indies; mortgage held invalid.

<sup>4</sup> 3 Moo. P. C. N. S. 290, 12 L. T. Rep. 808. Ticket issued in England for carriage to Mauritius, exempting liability for loss of baggage. Law of England governs.

<sup>5</sup> *In re Missouri S. S. Co.*, 42 Ch. D. 321; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *South African Breweries v. King*, [1899] 2 Ch. 173, [1900] 1 Ch. 273; *Spurrier v. La Cloche*, [1902] A. C. 446. This doctrine has been fully adopted by Professor Dicey. *Conf. Laws*, 2 ed., p. 529.



Before investigating the history of this doctrine in the United States it will be well to consider whence Lord Mansfield derived it. There is very little doubt of its origin. The authorities which he cited for his *dictum* were two continental writers, Huberus and Voet. No earlier English case laying down such a rule was cited by him or has ever been found by a later commentator or judge. The doctrine itself is one that is quite foreign to common-law notions. That parties should be allowed to choose a law for themselves by which they should be governed is not a natural notion in a law based like ours on the complete jurisdiction of the territorial sovereign. The continental idea of the applicability of law, derived from the political system of the Roman empire, regarded a system of law as the peculiar property of the person entitled to it, which he had at any time a right to claim; but he might at any time in place of it accept another system. A Roman citizen anywhere in the world had a right to claim the protection of the Roman law, though he might if he chose waive that protection and act in obedience to a provincial or barbarian law, and this liberty of choice persisted to modern times. It is a prevailing doctrine on the continent of Europe that in the case of all voluntary obligations, parties, since they have the right to choose whether or not they will be bound, have also the right to choose the law under which they shall be bound. This doctrine, first clearly formulated by Dumoulin, is known as the principle of autonomy of the will.<sup>1</sup> After the first argument of *Robinson v. Bland*, the court found itself unable to decide the case, and ordered a reargument; and among other suggestions they directed that civil-law authority should be looked into in the hope that the doctrines therein adopted might throw light on the case, in the absence of common-law precedent.<sup>2</sup> In view of these facts there can be but one conclusion. The doctrine was adopted bodily from the continental writers, and is an anomaly in our own law, though quite consistent with the principles of the modern civil law.

Is it then permissible for us to base principles of the conflict of laws on civil-law authorities? It is submitted in general that this should not be done. It is true that certain doctrines of the conflict of laws, relating to the limits of jurisdiction, are of international origin, and that they should therefore be the same throughout the civilized world;

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<sup>1</sup> A. Pillet, *Principes de droit int. privé*, chap. xv.

<sup>2</sup> See the report, 1 W. Bl. 234, 247.

a fact which is over-emphasized by the name *Private International Law*, often erroneously given to the subject. Apart however from questions of national jurisdiction there can be little doubt that the principles of the conflict of laws are in the fullest sense principles of the municipal law of each country. With us such questions are solved or should be solved entirely in accordance with common-law principles and analogies; and to follow the authority of writers on the modern civil law is as improper as it would be to accept from a continental writer the doctrine that a written contract requires no consideration. The practice introduced by Lord Mansfield, or at least in his time, of turning to civil-law authors and authority, and continued by several scholarly American lawyers during the first third of the nineteenth century was not one which has tended to preserve the correctness and the purity of the common law. It would have been better if Lord Mansfield had contented himself with a discussion of the case before him on the ground accepted by all the court, and had refrained from introducing into our law notions derived from an alien system of legal thought.

The authority of Lord Mansfield was powerful enough in America to secure the adoption of his *dictum* from the very start, and owing to the number of legally independent jurisdictions in this country the question came up more frequently than in England, and the doctrine became established by a considerable weight of authority long before it was firmly fixed in the mother country. The first writer to consider the question in an authoritative treatise was Kent, who laid down Lord Mansfield's rule with some little hesitation.<sup>1</sup> A few years later, however, Story accepted it in full. So important is his treatment of the subject in the history of our law that it seems worth while to give the substance of it in full:

"Generally speaking, the validity of a contract is to be decided by the law of the place where it is made. The same rule applies *vice versa*, to the invalidity of contracts; if void or illegal by the law of the place of the contract, they are generally held void and illegal everywhere. But there is an exception to the rule as to the universal validity of contracts, which is, that no nation is bound to recognize or enforce any contracts which are injurious to their own interests, or to those of their subjects." <sup>2</sup>

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<sup>1</sup> 3 Com. 48 (1 ed., 1828).

<sup>2</sup> Conf. Laws, §§ 242, 243, 244.



"The ground of this doctrine, as commonly stated, is that every person, contracting in a place, is understood to submit himself to the law of the place, and silently to assent to its action upon his contract. . . . It would be more correct to say, that the law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation to regulate all persons, property, and transactions within its own territory."<sup>1</sup>

"The law of the place of the contract is to govern as to the nature, obligation, and interpretation of it."<sup>2</sup>

"The rules already considered suppose that the performance of the contract is to be in the place where it is made either expressly or by tacit implication. But where the contract is either expressly or tacitly to be performed in any other place there the general rule is, in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance."<sup>3</sup>

Both Kent and Story cited a number of American cases in support of the doctrine they laid down. These cases had almost without exception adopted the intention of the parties as the test of the law of the contract. Thus, in *Powers v. Lynch*,<sup>4</sup> the Supreme Court of Massachusetts said, "Contracts are to be considered by the laws of the country where made . . . provided it does not appear from the nature of the contract, or from other facts, that in the contemplation of the parties, the performance of the contract has relation to the laws of another country." In New York the Supreme Court in *Thompson v. Ketcham*<sup>5</sup> said, "Where a contract is made in reference to another country, in which it is to be executed, it must be governed by the laws of the place where it is to have its effect." And a little later, in the same case<sup>6</sup> Chief Justice Kent said, "The *lex loci* is to govern, unless the parties had a view to a different place, by the terms of the contract." In *M'Candlish v. Cruger*<sup>7</sup> the South Carolina Court said, "Whenever the contract is made with a view of its being performed in another country, then the law of the place where the performance is to be made should be the true rule." And in Pennsylvania, in *Hazelhurst v. Kean*,<sup>8</sup> the court said, "The

<sup>1</sup> Conf. Laws, § 261.

<sup>2</sup> *Ibid.*, § 280.

<sup>3</sup> 4 Johns. 285 (1809).

<sup>7</sup> 2 Bay 377 (1802).

<sup>2</sup> *Ibid.*, § 263.

<sup>4</sup> 3 Mass. 79 (1807).

<sup>6</sup> 8 Johns. 189 (1811).

<sup>8</sup> 4 Yeates 19 (1804).

parties must be supposed to have in contemplation the law of the place where the contract is made, and it necessarily forms a part of the contract."

Hardly a voice seems to have been raised in opposition to this doctrine until, in the year 1841, Chief Justice Shaw, in *Carnegie v. Morrison*,<sup>1</sup> reëxamined the question, and reached a conclusion that does credit to his illuminated common-sense. It is positive law, he said, concurring with and giving effect to the act of the parties which determines the nature and extent of a contract. "The law operating upon the act of the parties creates the duty, establishes the privity and implies the promise and obligation on which the action is founded." The general rule, therefore, is that the *lex loci contractus* determines the nature and legal quality of the act done; whether it constitutes a contract; the nature and validity, obligation and legal effect of such contract; and furnishes the rule of construction and interpretation. He admits an exception where the parties act in a place where there is no law; and points out that the *execution* of a contract must be according to the legal requirements of the place of execution. "So far as this transaction constituted a legal and binding contract at all, it was, we think, by force of the law of the place of contract operating upon the act of the parties, and giving it force as such. The undertaking, it is true, was to do certain acts in England, to wit, to accept and pay the plaintiff's bills; but the obligation to do those acts was created here, by force of the law of this state, giving force and effect to the undertaking of the defendant's agent, and making it a contract binding on them. Supposing the law of England had provided that no letter of credit should be issued, unless under seal, or stamped, or attested by two witnesses, or acknowledged before a notary, is it not clear that, as no such formalities are required by our laws, a letter of credit made here would be held good without such formalities? We think it would be so held even in England, under the authority of the general rule, that a contract, valid and binding at the place where made, is binding everywhere."<sup>2</sup>

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<sup>1</sup> 2 Met. 381 (1841).

<sup>2</sup> Judge Shaw adds, it is true: "there is no reference, tacit or express, in this instrument, to the laws of England, which can raise a presumption that the parties looked to them as furnishing the rule of law which should govern this contract. It was, therefore, in our opinion, in legal effect, a contract made in Massachusetts by parties, both of whom were here by their agents, or persons acting for their benefit and in their behalf, and therefore the nature, obligation, and effect of this contract must be governed



The influence of Judge Shaw and the power of his reasoning have been sufficient to gain considerable adherence since that time to the doctrine that a contract is governed by the law of the place of contracting. Still oftener the court relies on his reasoning to support the rule that the law of the place of making the contract governs unless there is some extraordinary provision which shows that another law was contemplated. But on the whole, as will be shown, the prevailing tendency of the American cases is to regard the intention of the parties as controlling; and this intention is often conclusively found to be in favor of the law of the place of performance.

It is purposed, in another article, to consider the actual condition of the authorities in England and in the various jurisdictions of our own country.

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CAMBRIDGE, MASS.

[*To be continued.*]

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by the law of this Commonwealth." He thus seems to give a certain recognition to the power of parties by their own choice to make another law than that of the place of contract applicable to the obligation. But his whole line of reasoning, as well as the decision itself, leads directly to the conclusion that no other law than that of the place of making can apply to the validity or the nature of the obligation.

## THE FORCE AND EFFECT OF THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

THE Act to regulate commerce of February 4, 1887, sometimes called the "Cullom" law or the "Interstate Commerce" law, was subjected, from the day of its enactment, to a great deal of ignorant and unwarranted criticism. Hasty critics noted at once that the Interstate Commerce Commission, the body created to apply and enforce the new statute, was equipped with no process to compel obedience to its decrees; that to make its conclusions obligatory upon the carriers it must invoke and obtain the aid of the Federal courts, and they too readily assumed that in the absence of such aid, or until it could be utilized in each separate case, the work of the Commission would be unproductive and its orders would be futile. Although the experiment, from the beginning, amply refuted this attack upon the theory of the law and the immense power and influence of the Commission was promptly evident to close observers of its operations,<sup>1</sup> popular opinion never recovered from the initial impression which was made, and, when the revision of the law was undertaken in the years 1905 and 1906, Congress was strongly urged to attempt to

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<sup>1</sup> Testifying before the Committee on Interstate Commerce of the United States Senate in May, 1905, Honorable Martin A. Knapp, Chairman of the Interstate Commerce Commission, said, in part:

"There appears to be a disposition in some quarters to discredit the present law and belittle the result of its operations. It has been described as a crude and ill-considered measure which has made little advance toward the accomplishment of its intended purpose. I am very far from having any sympathy with that erroneous view. On the contrary, I regard the Act to regulate commerce as one of the most important and beneficent statutes ever enacted by the Congress of the United States. . . . Only when you compare the conditions which were characteristic and universal in 1887, with the conditions which generally prevail to-day, can you understand what great progress has been made in the conduct of these great highways of commerce. And I say that, if the men who were instrumental in procuring the passage of the Act to regulate commerce have their names connected with no other measure, they deserve to rank high in the list of constructive statesmen. And I say this for the reason, gentlemen, that I do not myself favor any radical departure from the theories and plans and purposes of the present law." Hearings before the Committee on Interstate Commerce, United States Senate, vol. iv, pp. 3292, 3293.



give a different and higher authority to the orders of the Commission. How far the Congressional intent was controlled by this purpose and the scope and validity of the methods employed are the questions proposed for discussion in this paper.<sup>1</sup>

Concerning the system in force from 1887 to 1906, that is until the enactment of the Hepburn law, the Supreme Court said:

"By Section 16 a summary proceeding in equity is authorized and the form of the ultimate order of the court may be that of a 'writ of injunction or other proper process, mandatory or otherwise.' Without attempting now to define the extent of that section we may say it seems adequate to enable the Commission to enforce any order it is authorized to make."<sup>2</sup>

Most of the orders of the Commission were obeyed; in the comparatively rare instances in which the aid of the courts was asked the following inquiries, and these inquiries only, were apparently presented:

A. Has a lawful order been issued?

B. Has it been obeyed?

Of these questions the second was found, in practice, to be negligible, for, while it is obvious that an order might be couched in such general terms as to permit a question as to whether certain acts constituted compliance therewith, no such controversy was, in fact, ever presented to any court. The controverted question, in every one of the forty-five litigated cases, was the lawfulness of the order. As an order might be unlawful because of (a) errors of fact or (b) errors of law, it was necessary to define the precise weight to be attached to the findings of fact of the Commission in subsequent proceedings for the enforcement of its orders. In an early case,<sup>3</sup> the authority of which has never been successfully challenged, it was held, (a) that the law invested the Commission with only administrative powers of supervision and investigation which fell far short of making it a court or its action judicial; (b) that its findings of fact, being given only the force and weight of *prima facie* evidence in subsequent judicial pro-

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<sup>1</sup> It should be borne in mind that the question of methods of compelling obedience to the Commission's decrees affects a relatively small proportion of the cases it handles. From 1887 to 1906 there were only forty-five instances, out of more than four thousand cases formally or informally considered, in which orders were contested in the courts, and it is a matter of public record that approximately thirty-nine out of every forty cases were settled without litigation in any court.

<sup>2</sup> Interstate Commerce Commission *v.* Lake Shore & Michigan Southern Railroad, 197 U. S. 536, 543.

<sup>3</sup> Kentucky & Indiana Bridge Company *v.* Louisville & Nashville Railroad, 37 Fed. 567.

ceedings, its functions were in the nature of those of a general referee of each and every circuit court of the United States for the matters covered by the Interstate Commerce law; (c) that in making these findings *prima facie* evidence Congress merely exercised the well-established legislative power to prescribe a rule of evidence which in no way encroaches upon the courts' proper functions; and (d) that the courts were not confined to the mere reexamination of the cases as heard and reported by the Commission, but might hear and determine them *de novo* upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony, bearing upon the matters in controversy, as either party might introduce.<sup>1</sup>

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<sup>1</sup> "While the Commission possesses and exercises certain powers and functions resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the Act designates as the 'recommendation,' 'report,' 'order,' or 'requirement' of the board is neither final nor conclusive; nor is the Commission invested with any authority to enforce its decision or award. Without reviewing in detail the provisions of the law, we are clearly of the opinion that the Commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court or its action judicial, in the proper sense of the term. The Commission hears, investigates, and reports upon complaints made before it involving alleged violations of or omissions of duty under the Act; but subsequent judicial proceedings are contemplated and provided for as the remedy for the enforcement, either by itself or the party interested, of its order or report in all cases where the party complained of, or against whom its decision is rendered, does not yield voluntary obedience thereto. . . . The Commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of *prima facie* evidence in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendation or order. The functions of the commissioners are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the Commission may be regarded as the general referee of each and every circuit court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the Act. It is neither a Federal court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings. . . .

"We are also clearly of opinion that this court is not made by the Act a mere executioner of the Commissioner's order or recommendation, so as to impose upon the court a nonjudicial power. . . . The suit in this court is, under the provisions of the Act, an original and independent proceeding, in which the Commission's report is made *prima facie* evidence of the matters or facts therein stated. It is clear that this court is not confined to a mere reexamination of the case as heard and reported by the Commission, but hears and determines the cause *de novo*, upon proper pleadings and



What may be called the administrative theory of the new law asserts that for the mechanism for enforcement thus defined, the Hepburn law<sup>1</sup> attempts to substitute a sort of advance legislative acceptance of an indefinite series of blank drafts, containing only the maker's name, to be filled out at discretion by the Interstate Commerce Commission, which is thus empowered to draw at will<sup>2</sup> upon the reservoir of Federal power over railway rates and methods. Let us inquire whether the terms of the enactment support this description. The Commission is authorized to issue orders under several different conditions and for different purposes, but particularly, under Section 15 of the law, it is authorized

"... whenever, after full hearing upon a complaint . . . it shall be of the opinion that any of the rates, or charges whatsoever demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, . . . or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate for charge or such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed."

It is further provided, in the same section, that the orders contemplated by the foregoing

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proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce bearing upon the matters in controversy. The court is empowered 'to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said Commission shall be *prima facie* (not conclusive) evidence of the matters therein stated.' No valid constitutional objection can be urged against making the findings of the Commission *prima facie* evidence in subsequent judicial proceedings. Such a provision merely prescribes a rule of evidence clearly within well-recognized powers of the legislature, and in no way encroaches upon the court's proper functions." *Kentucky & Indiana Bridge Company v. Louisville & Nashville R. R.*, 37 Fed. 567.

<sup>1</sup> Approved June 29, 1906, 34 Stat. L. 584.

<sup>2</sup> The Commission may, itself, institute proceedings "to the same effect as though complaint had been made," but, perhaps, this clause does not authorize rate-making without actual and formal complaint. Section 13.

"shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or set aside by a court of competent jurisdiction."

Supplementing these provisions the next section of the Act proceeds to provide penalties for disobedience and means for the enforcement of those penalties, in part, as follows:

"Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

"The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, . . ."

Here, apparently, is an attempt to give the force of law to the act of an appointive Commission and to penalize transgression of the *quasi*-laws, regulations or administrative orders, by whatever term they are most accurately designated, which that Commission may proclaim. Legislation along this line, to be valid, must be within strictly defined limits.<sup>1</sup> If the language of Sections 15 and 16 cannot be construed in any way except as indicating an intention to confer legislative powers upon the Commission this entire portion of the Act is invalid as beyond the constitutional power of Congress; if, on a narrower view, the power is not otherwise actually legislative in character but there has been an attempt to empower the Commission to set up rules which,

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<sup>1</sup> "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those alone to which the people have seen fit to confide this sovereign trust." Cooley, *Constitutional Limitations*, 7th ed., p. 163.

"The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Field v. Clark*, 143 U. S. 649.



if effectively supplemented by the penal clause, would subject to penalties as unlawful conduct which, in the absence of such rules, would be lawful, then the authority to issue the order may be sustained, but the penalties will fail and other portions of the statute must be searched for a means of enforcing the regulative orders.

It is to be noted that the order provided for in Section 15 is to issue when the Commission, being duly informed, shall be of a certain "opinion"; that this order may be "suspended or modified or set aside" by the Commission, or "suspended or set aside" by a court of competent jurisdiction, and that the period of its effectiveness is, within limits fixed by the statute, left to the discretion of the Commission. It is also important to note the fact that the penalty of forfeiture for violation of one of these orders and the manner of the enforcement of the penalty differ from the penalties and procedure provided in Section 10 for other violations of the Act. Section 16 prescribes a forfeiture to the United States to be collected by a civil suit, while Section 10 prescribes the ordinary criminal penalties of fine and imprisonment to be enforced by the ordinary criminal processes.<sup>1</sup>

Considering the language of the statute without regard to the rule of construction which requires the adoption of that interpretation which brings the enactment within the constitutional authority of the legislature, there would seem to be a good deal of reason for holding that the orders contemplated necessarily involve the exercise of legislative discretion. In *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railroad*, the Supreme Court said:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable, — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future, — that is a legislative act."<sup>2</sup>

The foregoing extract supports the suggestion that there can be but two means of dealing with interstate railway rates, — the legislative means and the judicial means. The Commission cannot have legislative power; it has not judicial power, for it could not exercise it

<sup>1</sup> Section 5440 of the Revised Statutes imposes penalties of fine and imprisonment whenever "two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy." So far as the prohibitions of the Hepburn law are effective, this section is undoubtedly applicable. See *United States v. Howell*, 56 Fed. 21.

<sup>2</sup> 167 U. S. 479, 499, 500.

without its members having the judicial tenure of their positions. But it might, within proper limits, be an adjunct to the body possessing legislative power; it may appear that it is an adjunct to the judicial branch of the Federal government. So far as the quotation seems to suggest that the judicial power is incompetent to deal with future rates it is plainly qualified by later sentences in the same opinion which clearly recognize a certain degree of judicial power to control future charges for the services of railway common carriers.

"And the argument is now made, and made with force, that while the Commission may not have the legislative power of establishing rates, it has the judicial power of determining that a rate already established is unreasonable, and with it the power of determining what should be a reasonable rate, and [to] enforce its judgment in this respect by proceedings in mandamus."<sup>1</sup>

Evidently the court thought that such power might have been conferred upon the Commission, in its capacity as "general referee" for the several circuit courts, and that such orders might have been made effective by subsequent judicial decrees, but that as it was not conferred "in unmistakable terms" it could not be derived by implication. The opinion, in the next sentence, continues:

"The vice of this argument is that it is building up indirectly and by implication a power which is not in terms granted."<sup>2</sup>

Members of the Interstate Commerce Commission have not hesitated, either before or since the passage of the Hepburn law, to describe the powers they claim under its fifteenth section, in terms

<sup>1</sup> 167 U. S. 479, 509.

<sup>2</sup> 167 U. S. 479, 509. It will be observed that this view of the meaning of the opinion serves, also, to explain the sentence in the opinion, so inexplicable when considered as approving a delegation of legislative power, which has troubled so many students. This sentence, in no way essential to the determination of the case then in hand, follows: "Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable." 167 U. S. 479, 494. Whatever doubt the foregoing may have raised in any mind as to the real attitude of the Supreme Court must have been dispelled by the unanimous opinion, written by the same hand, in *Interstate Commerce Commission v. Chicago Great Western Railway*, which says: "It is unnecessary . . . even to determine whether the language is sufficiently definite to make the duties cast on the Interstate Commerce Commission ministerial, and therefore such as may legally be imposed upon a ministerial body, or legislative, and therefore, under the Federal Constitution, a matter for Congressional action, . . ." 209 U. S. 108, 117, 118.



that unmistakably involve the exercise of legislative discretion. Thus, the accomplished Chairman of the Commission, whose clear intelligence, integrity of purpose, long service and courage in expression give exceptional weight to his published views, told the Committee on Interstate Commerce of the Senate, while the Hepburn law was under consideration:

"To my notion regulation is legislation. It must in the nature of the case begin with the tariff — that is to say, it must begin with requiring the announcement by the carrier of what he is going to charge. And then two questions at once arise . . . and the other question is, If that rate is wrong, how is it going to be corrected? . . .

"A tariff is a law. It is a rule of action of general application. So long as it is in force it has all the characteristics and all the binding obligations of a statute. To depart from it is a misdemeanor, and it does not make any difference whether that tariff law is passed by the railroads, made by a Commission, or enacted by Congress. In either case, if that law is wrong the only thing to do is to change the law. If that law is broken, then the thing to do is to punish the man who broke it. The courts are constituted to apply and enforce law and to punish those who violate law. The legislature is ordained to make laws and change laws, and in the very nature of the case the proposal to use the methods of a court to deal with a purely legislative question is incongruous and unsuitable."<sup>1</sup>

Again, after the enactment of the present law, speaking before the National Grain Dealers' Association, Chairman Knapp said:

"But when it comes to the other question, Is the toll which everybody pays more than ought to be paid; does it yield an excessive revenue to the carrier who is allowed to discharge this governmental function; does it operate with discriminating effect between different localities, or different articles of traffic; then I say you come to a question which the courts cannot and will not satisfactorily determine. And for this fundamental reason, that the question you thus raise is not a judicial question, but a legislative question.

"Therefore, the tribunal and instrumentality by which these questions are to be determined must be not a judicial tribunal, but a legislative tribunal."<sup>2</sup>

Another commissioner, Honorable Charles A. Prouty, writing in the light of many years' experience as a member of the Federal regulative body, in the year 1906, said:

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<sup>1</sup> Hearings before the Committee on Interstate Commerce, United States Senate, vol. iv, pp. 3299, 3300.

<sup>2</sup> Freight, December, 1907.

"Now the fixing of a railway rate is in its nature legislative rather than judicial. There is no standard by which it can be determined. . . . It is finally a question of judgment what, taking everything into account, ought fairly to be done."<sup>1</sup>

"The making of a railway rate rests in the judgment of the traffic official. Within very wide limits that official could not demonstrate by any legal standard and legal evidence that his rate was right; neither could the shipper demonstrate by the same methods that it was wrong."<sup>2</sup>

Notwithstanding these expressions and the impression likely to be derived from a hasty and superficial examination of the law, it is by no means certain that Congress, in formulating Section 15, fell into the error of attempting to delegate a portion of its legislative authority. Certainly, it is to be presumed in construing any separable part of the law, regardless of what may appear in some other separable part, that Congress was fully informed as to the unconstitutionality of any such delegation, and, if the language of the portion being construed will permit any conclusion as to the Congressional intent which is not obnoxious to the constitutional requirement, that conclusion is the one which is legally correct.

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity."<sup>3</sup>

It was even held by the Supreme Court in the "Commodities Clause" case and in *Harriman v. Interstate Commerce Commission*, that a statute must be so construed as to adopt that one among different meanings which avoids grave constitutional doubts or difficulties.

"If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but

<sup>1</sup> American Monthly Review of Reviews, May, 1906.

<sup>2</sup> American Monthly Review of Reviews, July, 1906. Of course no carrier can be, or ought to be called upon, in the absence of proof to the contrary, to prove "that his rate was right." As the Supreme Court said, in *Interstate Commerce Commission v. Chicago Great Western*, "The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. . . . Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers." 209 U. S. 108, 119, 120.

<sup>3</sup> *United States v. Delaware & Hudson Company* (the "Commodities Clause" case), 29 Sup. Ct. 527, and cases there cited.



so as to avoid a succession of constitutional doubts, so far as candor permits.”<sup>1</sup>

“... the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”<sup>2</sup>

But if search is made for an interpretation which avoids the constitutional inhibition of a delegation of legislative power and establishes in the Commission an authority not legislative in character, we are met, almost at the beginning, by a serious, though perhaps not insurmountable, obstacle. This is not, that the Commission is accorded power to name, in its order, the precise maximum rate, or even to define the precise “regulation or practice” that is just and reasonable “to be thereafter observed in such case.” As has already been made clear, the Supreme Court in the “Maximum Rate” case<sup>3</sup> did not declare that a grant of power to make such an order would have been ineffective; it merely held that no such grant had been made. If the courts of the United States can be authorized to control future rates, the Commission, as an auxiliary of the Federal courts, can be empowered to fix, subject to proper judicial review, the rates to be charged. Such judicial power to control future rates and practices was exercised several times in the enforcement of orders of the Interstate Commerce Commission under the Cullom law,<sup>4</sup> and unless it exists the decision of the Supreme Court in *United States v. Missouri Pacific*<sup>5</sup> is without explanation or meaning. The true doctrine is doubtless that enunciated in *Janvrin v. Revere Water Company*<sup>6</sup> by the Supreme Court of Massachusetts, which is briefly epitomized in the following extract:

“It calls on us to fix the extent of actually existing rights. With regard to such rights judicial determinations are not confined to the past. If it

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<sup>1</sup> *Harriman v. Interstate Commerce Commission*, 211 U. S. 407.

<sup>2</sup> *United States v. Delaware & Hudson Company*, 29 Sup. Ct. 527.

<sup>3</sup> *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railroad*, 167 U. S. 479.

<sup>4</sup> A decision commanding obedience to an order of the Commission naming a specific rate to be observed in the future was apparently approved by the United States Supreme Court in the “Social Circle” case. *Cincinnati, etc. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184.

<sup>5</sup> 189 U. S. 274.

<sup>6</sup> 174 Mass. 514; 47 L. R. A. 319.

legitimately might be left to this court to decide whether a bill for water furnished was reasonable, and if not to cut it down to a reasonable sum, it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future."

But, if there is no insurmountable obstacle in the fact that the Commission's orders are to be more specific than formerly, there is a very real and a very serious obstacle in the clause which seeks to give them the immediate force of law by prescribing penalties for their infraction. No body that is not legislative in character can define an Act or an omission which is, therefore and thereafter, to be regarded as criminal and to subject the person who commits or omits it to penalties. Than this, there is no function of government more essentially legislative. The penalty clause of Section 16, already quoted herein,<sup>1</sup> does not apply to the carrier, or carrier's agent, who is guilty of exacting an unreasonable or unjust rate or of enforcing an unreasonable or unjust regulation or practice, but to the person who disobeys an order of the Commission. Even applying to this clause the inevitably necessary qualification that to be effective at all the order to which it could relate must be a lawful order, that is to say, regularly issued and actually commanding observance of a reasonable maximum rate or a just regulation or practice, it is plain that the thing sought to be punished is not violation of the law against unreasonable rates or methods, but violation of the order of the Commission. Infractions of Federal law may be penalized by forfeitures of money, such forfeitures to be collected by a civil suit in the name of the United States, but

"This, though an action civil in form, is unquestionably criminal in its nature, . . ."

In *United States v. Eaton*,<sup>2</sup> the Supreme Court had under consideration a demurrer to an indictment against a person accused of violating a regulation of the Commissioner of Internal Revenue requiring wholesale dealers in oleomargarine to keep certain books and to make certain reports, the regulation having been promulgated in accordance with the statute. The Court held that such a dealer who "knowingly and wilfully" failed to keep the books or to make the reports was not liable to the penalties of the law, saying, in part:

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<sup>1</sup> *Ante*, p. 16.

<sup>2</sup> *Lees v. United States*, 150 U. S. 476, 480. See also *Boyd v. United States*, 116 U. S. 616, 634, and *Hepner v. United States*, 29 Sup. Ct. 474.

<sup>3</sup> 144 U. S. 677.



"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.'"

Recent cases arising under the laws concerning public forests and forest reservations are apparently upon all fours with those that may arise in efforts to enforce forfeitures for violations of the Commission's orders. By an Act of Congress, approved on June 4, 1897, the Secretary of the Interior was authorized to make rules and regulations for the protection of the public forests against destruction by fire and depredations, and it was specifically provided that violations of these regulations should be punished the same as violations of the Act itself.<sup>1</sup> Subsequently the authority of the Secretary of the Interior was transferred by law to the Secretary of Agriculture, and the latter promulgated certain regulations. Sustaining a demurrer to an indictment charging violation of one of these regulations, Judge Whitson, in the Federal District Court for the Eastern District of Washington, said:

"It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its laws.

"A citizen desiring to obey the laws would search the acts of Congress in vain to find that grazing sheep upon a forest reserve without the permit of the Secretary of Agriculture is a criminal offense. It has been suggested that the acts under which the indictment is drawn give notice that the Secretary may make rules and regulations, and that the search would not be complete and the inquiry concluded until it be ascertained whether he has made such rules and regulations, the violation of which it is expressly declared shall be a criminal offense. But here we are led back to the delegation of legislative power. The rules prescribed by the heads of the departments are not necessarily promulgated. While they may be procured, they are not as easily available as are the statutes of the United States; nor does our system contemplate an examination of those rules for the ascertainment of that which may or may not be a crime, for the right to prohibit a given thing under penalty belongs to Congress alone.

"Congress cannot leave a statute to be enlarged upon either by the courts or the executive department. It cannot authorize any other branch of the government to define that which is purely legislative, and that is purely leg-

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<sup>1</sup> 30 Stat. L. 35.

islative which defines rights, permits things to be done or prohibits the doing thereof. Certainly here, it is the Secretary of Agriculture who has undertaken to enact this law. He it is who has designated that which constitutes the crime. The thing prohibited, the thing for which the party is to be punished, the act which is the offense, is prescribed by the Secretary, and not enacted by Congress. As we have seen, this cannot be done."<sup>1</sup>

In a similar case arising in another jurisdiction, Judge Wellborn, of the United States District Court for the Southern District of California, said:

"Thus it will be seen that the very essence of the alleged crime, namely, what act shall constitute it, is not fixed by Congress, but wholly confided to the discretion of an administrative officer. If this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challengeable on that ground."<sup>2</sup>

It is plain that, if the foregoing extracts correctly express the law of the land, so much of the Hepburn law as seeks to impose penalties for disobedience of the orders of the Commission, before they have received judicial sanction and obedience to them has been commanded by courts of competent jurisdiction, must be unconstitutional and inoperative. The propriety of the suggested construction is fully sustained by the opinion of the Supreme Court of the United States in *Reagan v. Farmers Loan & Trust Company*, from which the following is taken:

"We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions, and if the rates established by the Commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains — that which establishes the Commission, and empowers it to make reasonable rates and regulations for the control of railroads. It is a familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent portion may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power, applying this rule, and the invalidity of these two provisions may be conceded without impairing the force of the rest of the act.

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<sup>1</sup> *United States v. Matthews*, 146 Fed. 306, 308, 310.

<sup>2</sup> *United States v. Grimand*, 170 Fed. 205, 209.



The creation of a commission, with power to establish rules for the operation of railroads and to regulate rates, was the prime object of the legislature. This is fully accomplished whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive or simply *prima facie* evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the legislature would not have established the Commission and given it power over railroads without these independent matters.”<sup>1</sup>

It is equally clear that, to save Section 15 from complete failure as an unconstitutional effort to delegate legislative power, the scope of the Commission's authority to issue orders must be interpreted so as not to involve the exercise of legislative discretion. Then, there will remain as an effective means of compelling obedience to proper orders when such obedience is not voluntarily accorded, the clause of Section 16 empowering the Commission, or any party injured by failure to obey such an order, to apply to a Federal circuit court for its enforcement and authorizing the courts to hear and determine such cases and to grant the necessary relief. That is to say, the construction necessary to give constitutionality to Sections 15 and 16 substantially restores the old procedure for the enforcement of the Commission's orders. These orders cannot be “self-enforcing” without being legislative in character; those who ignore them until they are sanctioned by a court cannot be subjected to penalties save those of public sentiment. The Commission is, as it always has been, the “general referee” in interstate commerce matters covered by the law for the circuit courts of the United States.

The new law differs somewhat from the old in the language in which it defines the relation of the courts and the Commission when the latter (or an interested party) has applied for a decree enforcing an order. To reveal the precise difference in terms these portions of both laws are set forth below in parallel columns.

*The “Cullom” law.*

“That whenever any common carrier, as defined in and subject to the provisions of this Act, shall violate, or refuse or neglect to obey or perform *any lawful order or requirement* of the Commission . . . it shall

*The “Hepburn” law.*

“If any carrier fails or neglects to obey *any order* of the Commission . . . any party injured thereby, or the Commission in its own name, may apply to the circuit court . . . for an enforcement of such order. Such

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<sup>1</sup> 154 U. S. 362, 395, 396.

be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way by petition, to the circuit court . . . alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; *and on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated*; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the *lawful order*, or requirement of said Commission drawn in question has been violated or disobeyed, *it shall be lawful for such court* to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to

application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that *the order was regularly made and duly served* and that the carrier is in disobedience of the same, *the court shall enforce obedience* to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus."



issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other process, mandatory or otherwise; and such money shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court."

The changes of phraseology which are particularly significant in connection with the discussion which follows are indicated, in the foregoing extracts, by italics. No one will fail to note the omissions of the word "lawful" as a qualification of the word "order," nor the substitution therefor, in the clause defining the condition precedent to the issue of the enforcing writ, of the requirement that the order shall have been "regularly made and duly served." The other significant alteration in this portion of the statute is the omission of the rule which formerly made the findings of fact of the Commission *prima facie* evidence. It is very difficult to comprehend how any one could

have regarded the word "lawful" in the original law as actually limiting in any degree the judicial power to enforce the orders of the Commission or attach any importance whatever to the substitution of the qualification "regularly made and duly served" in the new law. Certainly no statutory language could authorize the enforcement of an unlawful order, and none could be "regularly made" unless it were "lawful."

It would seem then that the conclusions reached in *Kentucky & Indiana Bridge Company v. Louisville & Nashville Railroad*,<sup>1</sup> already herein quoted, are applicable to proceedings for the enforcement of orders, under the new law, except that there are no longer any authoritative findings of fact which are entitled to be considered *prima facie* evidence, and that this decision as accurately defines the function of the Commission under the Hepburn law as it did under the law actually in force when it was rendered. The Commission has no authority, — it could have no authority, — to prescribe a rate or regulation or practice which is not limited in the law by the requirement that it must be reasonable and just. This limitation upon its authority is in the express terms of the statute and it is essential to the existence of any authority at all. And whether an act done under color of a power granted is actually within the terms of the grant of power must always be a fundamental inquiry when the validity or efficacy of the act is in question.<sup>2</sup> It is almost too obvious to be stated without apology, that in any judicial inquiry as to whether the Commission has acted within the scope of its authority every fact and consideration must be material and relevant which would have been material and relevant in the investigation upon which the Commission based the challenged order.

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<sup>1</sup> *Ante*, p. 13.

<sup>2</sup> "On the other hand, under another possible construction of the provision, the court has power to pass upon the reasonableness of the orders of the Commission upon their merits. We notice a trend in the decisions toward the latter construction, but we deem it inexpedient to express any opinion in the matter until after a final hearing." *New York Central & Hudson River R. R. v. Interstate Commerce Commission*, 168 Fed. 131.

"I have believed that if a law conferred upon a commission the authority in such a case as this — one of these contested cases — to substitute a reasonable rate, that the carrier could go to court on the theory that the Commission had exceeded its authority by prescribing an unreasonable rate." Honorable Martin A. Knapp, Chairman, Interstate Commerce Commission, Testimony before Interstate Commerce Committee, United States Senate, May, 1905, vol. iv, p. 3303.



The results of this inquiry may now be briefly summarized. If the analysis which has been undertaken is correct, it follows (*first*) that, as Congress could not confer legislative power upon the Commission, and as merely ministerial methods are incompetent to perform the tasks of rate-regulation, the orders which the regulative agency is empowered to make must depend upon inquiries of judicial quality; (*second*) that these orders cannot have compulsory force of themselves but must depend for their enforcement upon the Federal courts; and (*third*) that the forfeitures attempted to be provided for failure to obey orders must fail, as only a legislative body can define an act or an omission which by such definition becomes penal. It may be, also, that the rates named in an order made by the Commission, are entitled to weight, as *prima facie* evidence of what is just and reasonable, in a suit brought, under Section 8, by a plaintiff claiming damages for the omission of an act, viz. the act of obedience to an order, required by the law. When asked to enforce an order of the Commission the Federal circuit court must proceed substantially as it did under the "Cullom" law, except that it no longer has the aid of a *prima facie* case made up by the Commission.

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## CONCEALMENT OF ASSETS IN BANKRUPTCY CASES.

ALTHOUGH section 29 of the Bankruptcy Act has made it a crime in a debtor to have "concealed, while a bankrupt or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy," experience has shown that this is one of the usual incidents to be expected in the ordinary dishonest bankruptcy case. While the commercial community demands a criminal prosecution in an extraordinarily flagrant case of concealing assets, or where there is an unusual succession of such dishonest failures in a locality, yet the average merchant's primary interest is merely to recover such assets so as to make his dividend from the estate as large as possible. He is willing that such dishonest bankrupts shall be punished, but he will usually forego this desire if the bankrupt tempts him to accept a composition by giving him a few cents on the dollar more than "the assets in sight" will yield. While this may be due in part to a lax commercial standard amongst our merchants, it is also due to two definite faults in the administration of the bankruptcy law by the courts themselves. A composition proceeding under section 12 enables creditors to obtain their dividend more speedily than through the regular administration of a bankrupt estate. In large part this is inevitable. In part, however, it is due to a failure of the administrative part of the District Courts to compel the payments of dividends as often and as speedily as is contemplated under section 65 (b). But the principal cause of this is in the attitude of many of the courts in demanding a standard of proof concerning concealed assets, which is commercially impractical and legally unsound.

Very correctly the courts have generally laid it down as a fundamental axiom in this class of cases that they will not make an order on the bankrupt to turn over to his trustee secreted assets which he is alleged to be wrongfully withholding unless they are prepared to follow up a non-compliance with the same by a further order committing him for contempt of court.<sup>1</sup> The result, therefore, is that the

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<sup>1</sup> *American Trust Company v. Wallis*, 126 Fed. 464; *In re Rosser*, 101 Fed. 562, 4 A. B. R. 153; *In re Adler*, 129 Fed. 502, 12 A. B. R. 19; *In re Walder*, 152 Fed. 489, 16 A. B. R. 41.



inquiry concerning assets wrongfully concealed by a bankrupt from his trustee naturally divides itself into two distinct lines of investigation. The first is whether assets have been secreted by the bankrupt, and if so what they are. The second, what can be done by the bankrupt to procure their return.

There is very little real difficulty or difference of opinion in relation to this first question. If the creditors or the trustee establish by a fair preponderance of the evidence the facts from which a concealment of assets is to be deduced the court draws the natural inferences just as in any ordinary legal proceedings. On the other hand there is a very definite and irreconcilable conflict of opinion as to what the court will require from the complainants in the way of proof of the bankrupt's ability to comply with an order to return assets which the court is willing to believe have been wrongfully withheld from the bankrupt estate. This divergence of points of view and its consequent differences in the administration of the law by the various District Courts as well as the diversity of opinion between the several Circuit Courts of Appeal can best be illustrated by means of a typical case. In an exceedingly well written report a referee in bankruptcy submitted to the district judge for the Northern District of Georgia<sup>1</sup> the following findings of facts: 1. The bankrupt who was a country merchant in Georgia destroyed his original invoices of merchandise. 2. The bankrupt failed to produce the original book kept by him in his business, and offered no adequate explanation for its non-production. He produced a book purporting to be a copy thereof made under such circumstances as to justify the belief that it did not fairly set forth his business transactions. 3. A short time before the filing of the petition in bankruptcy the bankrupt was possessed of a stock of merchandise, so large as to attract attention. Persons qualified to judge of its value estimated it to be worth about \$20,000, which value was corroborated by statements of the bankrupt made before the bankruptcy proceedings. 4. The net amount of the goods, when the receiver took charge, was found to be only \$4423.53. 5. The sales made prior to the bankruptcy did not account for the discrepancy. 6. There was evidence that considerable merchandise had been moved from the bankrupt's store out of business hours, and there was strong suspicion that on several occasions during the night, boxes had been moved

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<sup>1</sup> Report of W. E. H. Searcy, Jr., quoted *In re* Rogowski, 166 Fed. 165, 21 A. B. R. 553.

from the bankrupt's store to that of his son-in-law a short distance away. A small part of such goods had been recovered by a receiver from the son-in-law. Without taking into account a considerable shortage of cash, the conclusion was reached that the bankrupt was withholding, secreting, and concealing from the trustee, merchandise. "That said merchandise withheld, secreted, and concealed by the bankrupt is within the possession or custody, or in the power and control of the said A. Rogowski, bankrupt."

After reading this report no reasonable business man or lawyer with commercial experience can have any doubt about that case. Yet on technical objections the report was recommitted to the referee for "a more specific finding." He then submitted a further report.

"I further find that there is no testimony which would authorize a finding that any part or all of said merchandise consisted of dry goods, or notions, or clothing or shoes, or any other particular class of merchandise, other than to find and say that it must of necessity have consisted of such articles of merchandise as were bought and carried in stock by the bankrupt. This is as full, definite and particular description of the merchandise as may be made from the evidence in the case."

Thereupon the district judge dismissed the trustee's petition for an order on the bankrupt to deliver up to him secreted assets because "the referee did not point out in this report where any of the goods were or locate them in a definite way."

Here, then, is a case where shortly before a failure the bankrupt had a considerable stock of merchandise, while after bankruptcy the assets are found to be but a small part of what they had been. Nothing in the ordinary course of business explains this. Circumstances irresistibly indicate a fraudulent secretion of property. No one except the bankrupt can say where the property now is. He either remains silent or offers no adequate explanation.

One view is pithily summarized and tersely put by Judge Sanborn.<sup>1</sup>

"The rule by which this issue is to be determined is that the property of the bankrupt estate traced to the recent possession or control of the bankrupt is presumed to remain there until he satisfactorily accounts to the court for its disappearance or disposition. He cannot escape an order for its surrender by simply adding perjury to fraudulent concealment or misappro-

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<sup>1</sup> *Boyd v. Glucklich*, 116 Fed. 131, 8 A. B. R. 393.



priation. It is still the duty of the referee and of the court, notwithstanding his oath and testimony, if satisfied *beyond a reasonable doubt* that he has property of the estate in his possession or under his control, to order him to surrender it to the trustee, and to enforce that order by confinement as for contempt."<sup>1</sup>

The opposing line of decisions is fairly represented by the opinion of the Court of Appeals for the Fifth Circuit referred to in the Rogowski case:<sup>2</sup>

"It follows unquestionably that an order imprisoning a bankrupt for contempt for failure to obey a decree to pay money or surrender goods into court, is erroneous as a matter of law, where the bankrupt by sworn answer denies that he has the money or goods, and it does not appear clearly and affirmatively from the record, notwithstanding his denials, that he has the power to comply with the decree. The bankrupt is at least entitled to that much protection if indeed the courts are to refuse to follow the wise rule of the common law which makes the sworn denials of the answer sufficient defence to the contempt proceedings, leaving the question of the truth of the answer to be contested in a prosecution for perjury."

Or perhaps this attitude of the courts is expressed more strikingly by the District Court of South Carolina,<sup>3</sup> which says that "the court in making an order to commit a bankrupt to jail as for contempt for failure to account for goods and money, should be governed by the same considerations which would influence a jury in a criminal prosecution, giving to the bankrupt the benefit of any reasonable doubt."

So, whichever of these opinions is followed, the conclusion inevitably is that no order is to be made on the bankrupt unless the court is satisfied *beyond a reasonable doubt* that the bankrupt has the secreted assets in actual possession or control. The proceeding to compel a restitution of assets with a possibility of punishment for contempt is perhaps in the majority of jurisdictions<sup>4</sup> regarded as "criminal in its character," and a conclusion against the bankrupt is to be reached only when the evidence induces such belief beyond a reasonable doubt.

The short answer to such arguments is that such proceedings are not in their nature criminal. In the courts of chancery an attachment

<sup>1</sup> *In re Gerstal* (Ill. S. D.), 123 Fed. 166, 10 A. B. R. 411; *In re Kane* (Pa. M. D.), 125 Fed. 984, 10 A. B. R. 478; *In re Dewell* (Mo. W. D.), 100 Fed. 633, 4 A. B. R. 60.

<sup>2</sup> *Samuel v. Dodd*, 142 Fed. 68, 16 A. B. R. 163.

<sup>3</sup> *In re Switzer*, 140 Fed. 796, 15 A. B. R. 468.

<sup>4</sup> *Moody v. Cole* (Me.), 148 Fed. 295, 17 A. B. R. 818; *In re Goldfarb* (Ga.), 131 Fed. 643, 12 A. B. R. 386; *In re Anderson* (S. C.), 103 Fed. 854, 4 A. B. R. 640.

to enforce obedience to an order to pay money or to surrender property is to be regarded as a civil execution for the benefit of the equitable owners of the fund.<sup>1</sup> "If the fact that a failure to comply with the order of the court may result in imprisonment of the respondent for contempt makes it a criminal case, many proceedings, and especially proceedings in courts of equity, would have to be treated as criminal proceedings. The failure on the part of the defendant to execute a conveyance decreed by a court of equity in a proceeding for a specific performance may be enforced by imprisonment as for contempt. Refusal to answer interrogatories in a bill of discovery, refusal to pay alimony in a divorce suit, disobedience to a writ of mandamus or violation of an injunction may result in such punishment; but no one will contend that for this reason such proceedings are in the nature of criminal actions. The punishment for contempt in bankruptcy proceedings is simply for disobedience of the judgment of the court after it is found that the respondent has money or property belonging to the bankrupt estate in his possession or under his control, and, although able to comply with the order of the court, wilfully refuses to do so. These provisions in the bankruptcy act, authorizing courts of bankruptcy to enforce obedience to their orders by punishment as for contempt, are neither novel nor unusual. They were included in every bankruptcy act, and similar provisions have been enacted by almost every State in the Union. . . . In proceedings supplemental to or in aid of executions, courts are authorized by these statutes to enforce the surrender of assets subject to executions, and for this purpose may commit to jail any person refusing to comply with such order."<sup>2</sup>

The rule requiring that the complainant shall establish "beyond a reasonable doubt" the bankrupt's possession or control over the sequestered property is only another aspect of this error of regarding contempt proceedings as criminal prosecutions. If the proceedings are not criminal there is of course no such rule of evidence. However, many courts which stop short of calling contempt proceedings criminal, still cling to this "beyond a reasonable doubt" rule. While there is more or less authority for this, yet the weight of authority is clearly that the rule of evidence is no more stringent on such issues than upon any other issues of fact in chancery. That amount of evidence which will satisfy the conscience of the court is sufficient. The ordinary rule

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<sup>1</sup> *In re Alphin & Lake Cotton Co.*, 134 Fed. 477, 14 A. B. R. 197.

<sup>2</sup> *In re Alphin & Lake Cotton Co.*, *supra*.



of the "fair preponderance of the evidence" is enough to discharge the burden of proof on the complainant in contempt proceedings.<sup>1</sup>

What has in part misled the courts is an excessive caution to prevent a harsh or abusive use of the provisions of the Bankruptcy Act by over-zealous creditors against their debtors. "Creditors who sell to persons of doubtful or unknown financial standing, and of unknown or suspicious character for integrity, and who, by their own lack of ordinary diligence, have become the victims of fraud, should proceed for redress under the ordinary methods of legal procedure, and cannot expect to use, as an ordinary agent in the collection of debts, the power to imprison for contempt, which is to be applied only in cases of contumacious resistance to the orders of the court."<sup>2</sup> In part too this error is due to the failure to recognize that the Bankruptcy Act itself has imposed upon the bankrupt an absolute duty to "submit to an examination concerning the conducting of his business, the causes of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property," etc.<sup>3</sup> The dispositions of his assets must necessarily be peculiarly within the knowledge of the bankrupt. His silence on the subject can admit of but one interpretation. It is of itself the most significant of evidence. While an explanation that does not explain is even worse.

Common sense would ordinarily dictate that "the question is whether it is sufficient for the bankrupts to state that they have not the property. If they have not the property, they should tell what they did with it. If they cannot do this, the court would be justified in finding that they still had it."<sup>4</sup> "If the money is once placed into the hands of a respondent, the burden is upon him to make some reasonable explanation of what has become of it or at least that it has ceased to be in his possession or under his control at the time the order to turn it over was made."<sup>5</sup>

This idea of shifting the duty of producing further evidence to explain or rebut evidence already introduced, which, if unexplained or uncontradicted, would be sufficient to establish a *prima facie* case is to-day common enough in many other classes of cases. Thus in the

<sup>1</sup> *Rapalje Contempt Par.* 126; *In re Cole*, 163 Fed. 180, 20 A. B. R. 761; *Verplank v. Hall*, 21 Mich. 470; *Stuart v. Stuart*, 123 Mass. 370; *Drakesford v. Adams*, 98 Ga. 722.

<sup>2</sup> *In re Davidson*, 143 Fed. 173, 16 A. B. R. 337.

<sup>3</sup> Section 7 (9).-

<sup>4</sup> *Matter of Levy*, 142 Fed. 442, 15 A. B. R. 169.

<sup>5</sup> *In re Alphin & Lake Cotton Co.*, 134 Fed. 477, 14 A. B. R. 194.

tort cases of daily occurrence in our courts, evidence of an accident may be introduced of such a nature that our common experience indicates that it would not have happened if there had not been negligence. Some courts have said that this makes out a *prima facie* case for the plaintiff, others say that the negligence is inferred or presumed. "But whichever form of expression may be chosen, *prima facie* evidence in legal intendment means evidence which if unrebutted or unexplained is sufficient to maintain the proposition and warrant the conclusion to support which it is introduced." <sup>1</sup>

This rule of law is no less applicable to the class of cases under consideration. "The presumption of law in such cases, in the absence of satisfactory explanation, is that the property traced to the hands of the bankrupt a short time prior to the suspension of business remains in his hands, and the bankrupt must answer therefor." <sup>2</sup>

So even though imprisonment for contempt may be the ultimate outcome of a petition to require the return of secreted assets by a bankrupt, still the correct rule of law is that applied in ordinary chancery suits. A proceeding to procure the return of concealed assets is neither criminal nor quasi-criminal in its nature. Such proceedings retain their character as civil throughout. The ordinary rules of evidence apply, and the ordinary inferences and presumptions are to be made. The plaintiff sustains his contentions if each material allegation is established by a fair preponderance of evidence. The bankrupt who has a statutory duty to make true and full disclosure of his property and his dealings, does not stand protected by any presumption of innocence nor is he entitled to any special protection from the court. Though it is of course true that the court should exercise with caution its extraordinary power to punish for contempt, where a proper case is presented by the evidence, a court is not to allow itself to be deterred by the consequences.

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<sup>1</sup> *Carroll v. Boston Elevated R.*, 200 Mass. 527, and cases there cited. See also *Wigmore Evidence*, chap. lxxxvi.

<sup>2</sup> *In re Rogers Dry Goods Co.*, 133 Fed. 100, 13 A. B. R. 266.



## CONFLICT OF LAWS AND THE ENFORCEMENT OF THE STATUTORY LIABILITY OF STOCKHOLDERS IN A FOREIGN CORPORATION.

IT is well settled that, without any express statutory enactment, one who subscribes to the capital stock of a corporation is liable to it for the par value of the shares for which he subscribes.<sup>1</sup> This obligation has been likened to a trust fund for the benefit of corporate creditors. They may enforce it even after the insolvency of the corporation.<sup>2</sup>

Many States, however, provide by statute for an additional liability on the part of the stockholders to the corporate creditors.<sup>3</sup> A familiar example of such statutory liability is that of stockholders in National Banks. Indeed this has frequently served as a model to the States. As with National Banks the liability is apt to be for a sum not greater than the par value of the stock. As with National Banks also the liability is secondary. The corporation, as such, is primarily liable for its own debts. It is only when the inability of the corporation to meet its debts is sufficiently shown (as by return of execution unsatisfied upon a judgment against the corporation) that the creditors may proceed against the stockholders individually.<sup>4</sup>

Since the liability is imposed by statute, the statute determines its nature and extent. Thus the time when the cause of action accrues,<sup>5</sup> the conditions upon which the liability may be enforced,<sup>6</sup> and the

<sup>1</sup> *Sanger v. Upton*, 91 U. S. 56; *Hawkins v. Glenn*, 131 U. S. 319; *Glenn v. Liggett*, 135 U. S. 533; *Glenn v. Marbury*, 145 U. S. 499. But a corporation may, if the circumstances require it, sell its stock for less than par, and, if the sale be *bona fide*, the purchaser will not be liable for the difference between par and the purchase price. *Handley v. Stutz*, 139 U. S. 417; *Clark v. Bever*, 139 U. S. 96.

<sup>2</sup> See *ante*, note 1.

<sup>3</sup> For a list see Beale, *Foreign Corporations*, chap. xvii.

<sup>4</sup> *Wilson v. Seligman*, 144 U. S. 41; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640; *Middletown Bank v. Ry.*, 197 U. S. 394; *Bernheimer v. Converse*, 206 U. S. 516.

<sup>5</sup> *Great Western Tel. Co. v. Purdy*, 162 U. S. 329; *Terry v. Anderson*, 95 U. S. 628; *Carrol v. Green*, 92 U. S. 509.

<sup>6</sup> *Pollard v. Bailey*, 20 Wall. 520; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Middletown Ry. v. Bank*, 197 U. S. 394.

persons to enforce it<sup>1</sup> are all determined by the statute as interpreted by the Court of last resort in the enacting State. The same is true as to the persons against whom the liability may be enforced. The statute imposes the liability on "stockholders." The persons who answer this description must obviously be ascertained with reference to the law of the State which created the corporation<sup>2</sup> — assuming, of course, a sufficient assent on their part to become stockholders. In other words substantive matters in respect to this liability must be tested by the law of the State which creates it.

In nature, nevertheless, this liability is a hybrid. It has both contractual and statutory features, and yet it is neither contractual nor statutory. It is incidental to membership in the corporation. It is imposed, irrespective of either knowledge or conscious assent, on all who become stockholders.<sup>3</sup> On the other hand, no person can be made a stockholder without his own consent. No one, therefore, becomes subject to this liability unless he voluntarily becomes a member of the corporation. This assent creates the contractual element of the liability, bringing it within the protection of the constitutional prohibition in regard to impairing the obligation of contracts. The State, therefore, may not increase the liability of existing stockholders.<sup>4</sup> But creditors contract with the corporation in reliance upon this additional security. They, also, may claim the protection of the constitutional provision. The State therefore cannot decrease the liability with respect to existing creditors.<sup>4</sup>

Yet the liability is not contractual. It lacks certain essential elements of contract. The stockholder assents to the statute, it is true, but there the likeness to a contract ends. In the first place the statute is not an offer; it imposes a liability as an incident of membership in the corporation. This burden, moreover, runs with the share of stock as a covenant runs with land. There is, however, no promisee. The stockholder does not contract, in respect of this liability, with the State for the benefit of creditors, with the corporation, or with

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<sup>1</sup> *Hale v. Allinson*, 188 U. S. 56; *Finney v. Guy*, 189 U. S. 335; *Jacobson v. Allen*, 12 Fed. 454; *Runner v. Dwiggins*, 147 Ind. 238.

<sup>2</sup> *Penobscot R. R. v. Bartlett*, 12 Gray (Mass.) 244; *Electric Welding Co. v. Prince*, 195 Mass. 242, 256; *Glenn v. Liggett*, 133 U. S. 533, 538. See Wharton, *Conf. of Laws*, p. 244.

<sup>3</sup> *Howarth v. Lombard*, 175 Mass. 570, 573-576; *Bernheimer v. Converse*, 206 U. S. 516, 529.

<sup>4</sup> *Bernheimer v. Converse*, 206 U. S. 516, 530.



the creditors themselves. He is, it is true, secondarily liable, according to the provisions of the statute, for the debts of the corporation. But he is not technically a surety.<sup>1</sup> Thus the corporation and the creditor may, without releasing him, extend by agreement the time for payment of the corporate obligation.<sup>1</sup> There is, in fact, no meeting of minds. The stockholder assents to the statute, either actually or constructively, by becoming a stockholder, and from this union of statute and assent the liability is born. This double nature of the liability has important effects when suit is brought on it in another State.

While the law of the creating State determines the extent of the liability, the law of the forum determines the extent of the remedy to be given in a suit thereon. Thus the law of the creating State determines when the cause of action accrues,<sup>2</sup> but the statute of limitations of the forum determines whether the action is barred.<sup>3</sup> The creating statute prescribes the conditions of enforcement;<sup>4</sup> the law of the forum determines whether the liability is enforceable.<sup>5</sup> The law of the creating State determines whether an exclusive statutory remedy has been coupled with the right;<sup>6</sup> the law of the forum determines whether that remedy can be given in the State in which action is brought.<sup>7</sup> The law of the creating State determines who is the proper party plaintiff;<sup>8</sup> the law of the forum determines whether the plaintiff is the proper party.<sup>9</sup> In a word the creating law determines what the liability is; the law of the forum determines what effect, if any, is to be given thereto.

A collateral question, which often arises in regard to enforcing the superadded liability in other States, well illustrates both branches of this rule. It frequently happens that such suits are brought by a receiver appointed in the State which created the liability. It is a

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<sup>1</sup> *Boice v. Hodge*, 51 Oh. St. 236.

<sup>2</sup> See *ante*, note 5, p. 37.

<sup>3</sup> *Great Western Tel. Co. v. Purdy*, 162 U. S. 329; *Platt v. Wilmot*, 193 U. S. 602.

<sup>4</sup> See *ante*, note 6, p. 37.

<sup>5</sup> *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184; *May v. Black*, 77 Wis. 101; *Finney v. Guy*, 106 Wis. 256.

<sup>6</sup> *Pollard v. Bailey*, 20 Wall. 520.

<sup>7</sup> *Fourth National Bank v. Francklyn*, 120 U. S. 747; *Middletown Bank v. Ry.*, 197 U. S. 394; *Erickson v. Nesmith*, 4 Allen (Mass.) 233; *Clark v. Knowles*, 187 Mass. 35.

<sup>8</sup> See *ante*, note 1, p. 38.

<sup>9</sup> *Hale v. Allinson*, 188 U. S. 56; *Finney v. Guy*, 189 U. S. 335; *Bernheimer v. Converse*, 206 U. S. 516.

familiar rule that a Chancery receiver may not sue outside the State in which he is appointed.<sup>1</sup> The reason is plain. A Chancery receiver is merely the arm of the court of equity which appoints him. That court draws its powers from the State which establishes it. It has no power to act outside that State.<sup>2</sup> Clearly it cannot delegate powers which it does not itself possess. A Chancery receiver, therefore, cannot *of right* sue in another State. It is true that a few federal cases have permitted such a receiver to sue on the ground of comity,<sup>3</sup> but this position has since been repudiated by the Supreme Court.<sup>4</sup> On the other hand, a receiver who is clothed with the legal interest in a cause of action may sue in other States.<sup>5</sup> In such a case he sues, not as receiver, but as title holder. His receivership is the means by which he is clothed with the title, but it clothes him with no extra-territorial power, save that which springs from such title. Suit by a receiver, therefore, illustrates both branches of the rule. The extent of his interest is determined by the law of the State of appointment;<sup>6</sup> the question whether that interest is sufficient to sustain suit by him in another State is governed by the law of the forum.<sup>7</sup>

It now becomes necessary to consider certain characteristics of the three general systems of statutory liability, in order to determine how far each system is enforceable outside the State of creation. These systems differ mainly in the nature of the *remedy* provided by the creating State. *Substantively* all are similar in that each is secondary and may not be resorted to until the inability of the corporation to meet its debts is sufficiently established. But, as will be shown, the nature and extent of the remedy conferred by the enacting State may limit enforcement of this statutory right in other States. These three

<sup>1</sup> Booth v. Clark, 17 How. (U. S.) 322.

<sup>2</sup> Thus a court of equity, even though it has personal jurisdiction of the defendant, will seldom, if ever, order him to take affirmative action in another State. Carteret v. Petty, 2 Swanst. 323; Watkins v. Holman, 16 Pet. (U. S.) 25.

<sup>3</sup> Hale v. Haddon, 95 Fed. 747; Hale v. Tyler, 104 Fed. 757; Hale v. Hilliker, 109 Fed. 273.

<sup>4</sup> Hale v. Allinson, 188 U. S. 56; Finney v. Guy, 189 U. S. 335; Great Western Mining Co. v. Harris, 198 U. S. 561.

<sup>5</sup> Relfe v. Rundle, 103 U. S. 222; Howarth v. Lombard, 175 Mass. 570; Bernheimer v. Converse, 206 U. S. 516. The same is true of an assignee. Hawkins v. Glenn, 131 U. S. 319; Glenn v. Liggett, 135 U. S. 533.

<sup>6</sup> Hale v. Allinson, 188 U. S. 56; Bernheimer v. Converse, 206 U. S. 516.

<sup>7</sup> See cases cited *ante*, note 6. The test laid down by a recent decision is: Has the receiver such an interest as will support suit in the State of appointment? Hale v. Allinson, *supra*.



systems, therefore, will be classified according to the remedy coupled thereto by the enacting State.

The crudest system permitted any creditor to proceed against any stockholder at common law, after recovering a judgment against the corporation upon which execution had been returned unsatisfied.<sup>1</sup> This worked unsatisfactorily. It apportioned the burden unequally between large and small stockholders. The large stockholders were sued, because enough could be recovered from them to make the litigation pay, while for the opposite reason the small stockholders were often not sued at all. The creditor, in a word, could thus select, according to caprice or whim, the person or persons who must bear this corporate burden. On the other hand, while this liability was held to be enforceable in some States,<sup>2</sup> the courts in other States declined to enforce it for reasons of public policy.<sup>3</sup> It was urged against enforcement that the liability was statutory; that the creating statute was without force outside the enacting State, and that, therefore, no action could be brought thereon outside the State which created the right. But to this argument it was replied that, when the cause of action had accrued, the creditor could sue at law as if for a breach of contract. This view and the consensual elements of the liability led the United States Supreme Court to hold the statutory right enforceable outside the State of creation.<sup>4</sup>

The next system effected a more equitable distribution of the burden, although it did not do complete justice. The element of caprice was eliminated by defining a special statutory remedy. As in the system just discussed, the inability of the corporation to meet its debts had first to be established, but, this condition precedent having been performed, the statutory remedy resembled a gigantic bill of peace. All the creditors were allowed to file a bill in equity, within a certain time, against the corporation, and all the alleged stockholders who could be reached within the jurisdiction.<sup>5</sup> In this action the various conflicting rights and equities were adjusted. In the first place, the

<sup>1</sup> *Wilson v. Seligman*, 144 U. S. 41 (Mo.); *Whitman v. Oxford Nat. Bank*, 176 U. S. 559 (Kan.).

<sup>2</sup> *Whitman v. Oxford Nat. Bank*, 176 U. S. 559.

<sup>3</sup> See *ante*, note 5, p. 39.

<sup>4</sup> *Whitman v. Oxford Nat. Bank*, 176 U. S. 559; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640.

<sup>5</sup> *Middletown Bank v. Ry.*, 197 U. S. 394 (Ohio); *Hale v. Allinson*, 188 U. S. 56 (Minn.).

assets of the corporation were applied on its indebtedness. Then the question whether each individual defendant was a stockholder, and, if so, to what extent, was determined as against him. Thereafter the unpaid balance of the corporate indebtedness was ascertained, and apportioned among the various defendant stockholders, in proportion to their holdings. If any stockholder was insolvent and unable to meet his proportion, his transferors were called in to meet those corporate debts which existed or were contracted at the time the transferor was a stockholder.<sup>1</sup> The final result was a crop of personal judgments which were collected for division among the corporate creditors.

Nevertheless this method of enforcing the liability had a serious defect. The statutory remedy in equity was held to be exclusive.<sup>2</sup> In the State of creation no other was applicable. But stockholders in other States were, as a matter of common justice, entitled to similar protection. To permit the creditor to sue foreign stockholders at law subjected them to a heavier burden than rested upon domestic stockholders. The remedy therefore was held to be coupled to the right both at home and abroad.<sup>3</sup> But the statute defining the remedy was not in force outside the enacting State. That remedy, therefore, could not be given outside the State of creation. Moreover, since the remedy was exclusive, no other could be given. The result was that the right could not be enforced outside the State of creation.<sup>3</sup> Under this system, therefore, the whole burden was cast on domestic stockholders.

Thus in avoiding one difficulty this second form of remedy fell into another. The first system was enforceable both within and without the enacting State. But both within and without the enacting State the stockholders were subject to the creditor's caprice. He selected at will the persons to bear the corporate burden. This second system divided the burden proportionally among all domestic stockholders alike. All who could be found were necessary parties to the bill of peace. The caprice of the creditor was therefore eliminated. But in reaching this result mobility was sacrificed. The right ceased to be enforceable outside the State of creation. The problem, therefore,

<sup>1</sup> As an example see *Brown v. Hitchcock*, 36 Oh. St. 667; *Wheeler v. Faurot*, 37 Oh. St. 26; *Harpold v. Strobart*, 46 Oh. St. 397; *Poston v. Hull*, 75 Oh. St. 502.

<sup>2</sup> *Pollard v. Bailey*, 20 Wall. 520.

<sup>3</sup> *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Middletown Bank v. Ry.*, 197 U. S. 394; *Erickson v. Nesmith*, 4 Allen (Mass.) 233; *Clark v. Knowles*, 187 Mass. 35.



was to provide a remedy which would be enforceable both within and without the State, and which would still apportion the burden fairly.

To meet this need the assessment system was evolved, following the model provided by the National Banking Act.<sup>1</sup> By the assessment system the equitable action of the second system above described is split into two parts, one in equity against the corporation, the other at law against the stockholders individually. As in the two systems already discussed, the inability of the corporation to meet its debts must be shown as a condition precedent to this relief; for instance, by return of "no goods" upon an execution issued on a judgment against the corporation. Thereafter action is brought against the *corporation* to obtain a receiver. In this action the excess of corporate debts over corporate assets is established and the amount of capital stock outstanding is determined. It then becomes a matter of simple arithmetic to ascertain what must be collected from the holder of each share of stock.

A concrete example will make this clear. Suppose that in this action against the *corporation*, the corporate debts are found to be one million; the corporate assets, five hundred thousand; and the capital stock issued, one million. The difference between the debts and the assets is five hundred thousand dollars of debt. This is precisely one-half the outstanding capital stock. The assessment therefore is fifty per cent, or fifty dollars on each share of one hundred dollars, by whomsoever such share may be held.

But this assessment proceeding is directed against the corporation alone. Jurisdiction of the corporation is sufficient to sustain it.<sup>2</sup> Indeed a recent case has held that no notice need be given to the stockholders.<sup>3</sup> This is entirely logical. The stockholders are not personally before the court. No personal judgment is rendered against them.<sup>4</sup> Indeed no person is adjudged to be a stockholder,<sup>4</sup> though the total amount of stock outstanding is ascertained as one of the corporate liabilities. Other personal defences are left open. For example, one

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<sup>1</sup> For examples under the National Banking Act, see *Kennedy v. Gibson*, 8 Wall. 498; *Casey v. Galli*, 94 U. S. 673.

<sup>2</sup> *Bernheimer v. Converse*, 206 U. S. 516; *Howarth v. Lombard*, 175 Mass. 570. See also *Hawkins v. Glenn*, 131 U. S. 319.

<sup>3</sup> *Goss v. Carter*, 156 Fed. 746.

<sup>4</sup> *Bernheimer v. Converse*, 206 U. S. 516, 532; *Howarth v. Lombard*, 175 Mass. 570, 579.

sued on the assessment may set up that section of the statute of limitations of the forum, which is applicable to ordinary actions of contract.<sup>1</sup> In other words the burden which each share of stock must bear is ascertained, though the persons who must bear that burden are not determined. In this way equality of burden is obtained without violating any personal right. The question of personal liability is left to be settled in the separate actions at law against the individuals alleged to be stockholders.

Yet the assessment proceeding is a judicial proceeding. The necessity for and the extent of the assessment are *res adjudicatae* against the corporation. The assessment binds, in their *corporate*, though not their *personal* capacity, all persons who are in truth stockholders. This result follows from the nature of a corporation. The law has conferred on the associates a common legal entity. They may sue and be sued, in respect of *corporate* matters, in the corporate name. Just as the stockholders need not join in an action by the corporation, so they need not be joined in an action against the corporation. They are to this extent represented by the corporate entity. Thus a valid judgment against the corporation forecloses, as against stockholders, everything which is properly adjudged against the corporation. It follows that the judgment against the corporation is not open to collateral attack by a stockholder upon the ground that he was not joined in the action.<sup>2</sup>

A further proceeding is therefore necessary to render the assessment effective as a personal liability. The assessment fixes the *rate* of liability, but the *persons* who are liable have yet to be judicially ascertained. This is done in single actions at law brought against each alleged stockholder respectively. In each of these actions the plaintiff must establish that the defendant is in truth a stockholder, and show the number of shares held by him. The defendant, as has been shown, may bring forward any personal defence, though he may not attack either the necessity for or the extent of the assessment. In other words the assessment represents the measure of damages which will be applied if personal liability as a stockholder is established.

The assessment method therefore combines the advantages of both the former systems. By the assessment proceeding proper, a uniform

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<sup>1</sup> *Ramsden v. Knowles*, 151 Fed. 718, affirmed in 151 Fed. 721; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329.

<sup>2</sup> *Howarth v. Lombard*, 175 Mass. 570; *Bernheimer v. Converse*, 206 U. S. 516.



rate of burden per share is established for all stockholders, large and small. This proceeding is necessarily local and can be enforced only where personal jurisdiction of the corporation may be had. But such jurisdiction may always be obtained in the State where the corporation is created. This local feature therefore presents no difficulty. On the other hand, the personal liability of each individual is fixed in a subsequent action at law. This so far resembles a common law action that it may be brought outside the State which creates the liability, though the right is partly of statutory origin.<sup>1</sup> The local nature of the "bill of peace" method is thus confined to the assessment proceeding proper, and no longer prevents enforcement of the liability outside the State of creation. The assessment method, therefore, combines proportionate uniformity of burden with general enforceability against all who ought to bear the burden.

The three systems, therefore, may be recognized by their fruits. In the first, a crop of single actions at law sprang up as soon as the inability of the corporation to meet its debts was properly shown. In the "bill of peace" system a single action in equity, to which corporation, creditors, and stockholders were all parties, replaced the group of actions at law in system one. In this single action in equity *personal judgments* were rendered against all persons who were made parties and adjudged to be stockholders. This sharply differentiates it from the assessment proceeding proper in which the rate of liability is determined, but the persons to be held liable are not ascertained. The assessment method, therefore, differs from system one in that the ascertainment of this rate of liability is the condition precedent to the accrual of the separate personal rights of action against the stockholders. It differs from the "bill of peace" system in that a judgment against the defendant in the separate personal action at law is the condition precedent to personal liability. The first and third systems, therefore, are enforceable outside the State imposing the liability, the second is not.

In this connection, however, an important distinction must be noted. The nature of the remedy may clog enforcement of the liability without contractually limiting the right. This point was directly presented and decided in *Bernheimer v. Converse*, 206 U. S. 516. In that case certain non-residents had become stockholders in a Minnesota corporation at a time when the statute made an equitable action similar

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<sup>1</sup> *Bernheimer v. Converse*, 206 U. S. 516; *Howarth v. Lombard*, 175 Mass. 570.

to a bill of peace, the proper method of enforcing the stockholders' liability. Subsequently the legislature repealed this remedy and substituted the assessment method in its place. A remedy enforceable against these non-residents was thus substituted for one which was unenforceable against them. The corporation was wound up; the amount of assessment determined; and the defendants were sued under the new statute. They contended that the statute was unconstitutional in that it enlarged their liability. The Supreme Court rejected this view and held that the extent of the liability was not diminished by imposing a remedy which confined enforcement to the State of creation; that the legislature might properly substitute an effectual for an ineffectual remedy, and that therefore the statute was not invalid as impairing the obligation of the stockholders' contracts. This case emphasizes the distinction between the "assessment" and the "bill of peace" methods of enforcement. It also shows that, where the remedy alone shackles the right to the State of creation, the legislature may strike off the clog and make the liability enforceable, both within and without the State.

Thus far, so far as the writer knows, there has been no attempt in this country to devise a single proceeding which will foreclose the personal defences of absentees. As has been shown, the "bill of peace" method results in personal judgments only against those who were personally before the court, while the assessment method does not determine any individual liability in the assessment proceeding. It has been long established that service by publication will not give personal jurisdiction.<sup>1</sup> On the other hand, personal jurisdiction may be conferred by consent. Thus voluntary appearance before the court, either as plaintiff,<sup>2</sup> or as defendant,<sup>3</sup> will confer jurisdiction without personal service. Agreement between the parties may confer personal jurisdiction.<sup>4</sup> Thus a foreign corporation may consent to be sued within the State as the price of permission to do business therein.<sup>5</sup> Moreover, if a statute exacts such consent as a condition precedent to doing business, doing business in the State will amount to consent.<sup>5</sup> A stockholder in a foreign corporation may in like manner consent to

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<sup>1</sup> *Pennoyer v. Neff*, 95 U. S. 714; *Wilson v. Seligman*, 144 U. S. 41. See also *Hale v. Allinson*, 188 U. S. 56.

<sup>2</sup> *Ricardo v. Garcias*, 12 Cl. & Fin. 367; *Fitzsimmons v. Johnson*, 90 Tenn. 416.

<sup>3</sup> *Voinet v. Barrett*, 55 L. J. Q. B. 39; *Hilton v. Guyot*, 159 U. S. 113.

<sup>4</sup> *Feyericks v. Hubbard*, 18 T. L. R. 381; *Dicey, Conf. of Laws*, 1 ed., 369.

<sup>5</sup> *St. Clair v. Cox*, 106 U. S. 350.



be sued in respect of corporate matters in the courts of the State which creates the corporation.<sup>1</sup> Thus, if, in accordance with French law, the stockholder designates some French person on whom service may be made, such service is sufficient.<sup>2</sup> And where such consent is expressly made a condition of membership in the corporation, one who takes stock therein will be held to have assented, even though he was ignorant of the provision.<sup>3</sup> And if a statute designates the chairman of a joint stock company as the representative of its members for purposes of suit, a judgment obtained against such chairman binds all the members of the company personally, even though they, or any of them, were ignorant of the statute at the time of joining the company, and were not personally served in the action.<sup>4</sup> It seems, therefore, and these authorities are all that the writer has been able to find, that if a stockholder assent to be sued, without personal service, in the courts of the State which creates the corporation, such assent will confer personal jurisdiction.

On the other hand, such assent is not lightly to be inferred.<sup>5</sup> In every one of the stockholder cases cited above there was some *express* provision of the statute enacting such assent as an incident of membership in the corporation. Nothing less should suffice. Even the *express* provision in respect of the superadded liability imposes great hardships. Corporate stock is sold far and wide. The statutes of the State which creates the corporation are seldom accessible to the purchaser. Frequently even skilled legal examination is not sufficient to unravel all their meaning. But the *express* provision in respect of liability at least gives notice that *some* liability is assumed even though its nature and extent may not be plain. Nothing less should deprive a man of his ordinary right to personal service. To render service by publication sufficient the statutory provision should be prominent and explicit. Indeed common fairness would dictate placing both this and the liability provision upon the certificate. Perhaps

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<sup>1</sup> Copin v. Adamson, L. R. 9 Exch. 345.

<sup>2</sup> Vallée v. Dumergue, 4 Exch. 290.

<sup>3</sup> Copin v. Adamson, L. R. 9 Exch. 345, but see dissenting opinion by Kelly, C. B. The decision was affirmed in 1 Ex. D. 17.

<sup>4</sup> Bank of Australasia v. Nias, 16 Q. B. 717; Kelsall v. Marshall, 1 C. B. N. S. 241; Bank of Australasia v. Harding, 9 C. B. 661; and see generally 20 HARV. L. REV. 323.

<sup>5</sup> Emanuel v. Symon, L. R. 1908, 1 K. B. 302; reversing Emanuel v. Symon, L. R. 1907, 1 K. B. 235. See also Hall v. Lanning, 91 U. S. 160; D'Arcy v. Ketchum, 11 How. 165.

this feeling leads to the singular dearth of authority in this country. The writer has discovered no American case which directly passes on this question of assent to jurisdiction by a stockholder. It seems to be assumed as a matter of course that a mere provision for service upon non-resident stockholders by publication, without more, will not draw after it an assent that such service shall be sufficient.<sup>1</sup> While, therefore, there is little direct authority, it seems that neither membership in the corporation nor a statutory provision for service by publication, without more, will confer personal jurisdiction of non-resident stockholders. Some more explicit requirement in respect of such assent seems necessary even to raise the question.

It may be indeed that to require non-residents, as distinguished from residents, to assent to such service would be unconstitutional. This in the last analysis would depend on the question whether the right to hold stock in a domestic corporation upon the same terms as domestic stockholders is a privilege or immunity of citizens of the several States. The question is remote at present and has no place in this article. But it may become serious in the future.

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<sup>1</sup> *Wilson v. Seligman*, 144 U. S. 41; *Hale v. Allinson*, 188 U. S. 56, 80.



# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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THE LAW SCHOOL. — An unusual number of changes in courses are announced for the current year. With a view to making the course on Trusts one for Third Year men, it is this year omitted. What was formerly the course on Carriers has been expanded into a course on Public Service Companies which will be given two hours each week during the whole year by Professor Beale and Professor Wyman. Insurance, again under Professor Wambaugh, has been reduced to a half course to be given during the first half-year. A new instructor appears in Mr. Joseph Warren, LL.B. 1900, a former editor of this Review, who will assist in the course on Criminal Law and conduct the course on Persons. Two new regular courses are offered. That on International Law as administered by the Courts will be given by Professor Wambaugh one hour a week during the entire year, and that on Patent Law by Mr. Stackpole, LL.B. 1898, who has before given the same course, two hours a week during the first half-year. As extra courses will be given a course on Massachusetts Practice, and a course on the Law of Mining and Irrigation, the instructors in which have not yet been chosen.

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THE PROPOSED INCOME TAX AMENDMENT. — The Federal Constitution provides that "the Congress shall have power to lay and collect taxes, duties, imposts and excises . . . but all duties, imposts and excises shall be uniform throughout the United States";<sup>1</sup> and that "no direct tax shall be laid unless in proportion to the census or enumeration hereinbefore

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<sup>1</sup> Art. I, § 8, par. 1.

directed to be taken."<sup>2</sup> Following an early statement by the Supreme Court that it is Great Britain "from whence we take our general ideas of taxes, duties, imposts, excises, customs, etc.,"<sup>3</sup> and a later declaration by the Supreme Court that for purposes of determining its validity a tax should be classified according to its practical results rather than according to economic theories,<sup>4</sup> it has been convincingly pointed out in a recent article in this Review that legally and historically the only distinction to be taken is between taxes which are to be apportioned and taxes which are to be uniform; that at the time of the Constitutional Convention the name "direct tax," or simply "tax," properly applied only to the former, while the latter ranked as "duties."<sup>5</sup> In effect, then, the Constitutional provision is that all taxation must fall under one or the other of these two heads; and that every "tax" must be apportioned, and every "duty" uniform.

The legal history of the income tax in this country divides itself into three periods. In 1796 the Supreme Court decided that an act laying certain "annual duties and rates" on the use of personal property<sup>6</sup> was constitutional, although operating uniformly, for the reasons that apportionment was not practical, and that such a tax was a "duty" within the English meaning of that word.<sup>7</sup> When the income taxes imposed after the Civil War were attacked, the principle of this early case was extended: in a series of decisions the Supreme Court held that a general income tax upon both real and personal property need not be apportioned, but was a duty, and as such correctly levied under the rule of uniformity.<sup>8</sup> But when the validity of the general income tax of 1894 was called into question, the Supreme Court held that so much of it as applied to rents and income from real estate was void as being a tax which should be apportioned; and that, part of the act being thus void, the whole was invalid.<sup>9</sup> In other words, that part of a general income tax appertaining to realty was declared by the earlier court to be a "duty," while the later court pronounced it a "tax."

The proposed Sixteenth Amendment to the Constitution, which has been passed by Congress and ratified by one state, provides that "the Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."<sup>10</sup> Apportionment is here expressly excluded, while because of the use of the word "taxes," the requirement of uniformity which applies only to "duties, imposts and excises" cannot, without straining of legal construction, be imposed. Thus the proposed amendment presents the anomaly of a Federal power of taxation absolutely unrestricted, and entirely opposed to the principle of the Constitution requiring either the rule of apportionment or the rule of uniformity to govern in every instance. The amendment seems to be open at least to the

<sup>2</sup> Art. I, § 9, par. 4.

<sup>3</sup> *Hylton v. U. S.*, 3 Dall. (U. S.) 171, 174-5, 181.

<sup>4</sup> *Nicol v. Ames*, 173 U. S. 509, 515-6; *Knowlton v. Moore*, 178 U. S. 41, 83.

<sup>5</sup> 20 HARV. L. REV. 292-6.

<sup>6</sup> 1 Stat. at L. 373, c. 32.

<sup>7</sup> *Hylton v. U. S.*, *supra*, p. 175.

<sup>8</sup> *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; *Scholey v. Rew*, 23 Wall. (U. S.) 331; *Springer v. U. S.*, 102 U. S. 586.

<sup>9</sup> *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601.

<sup>10</sup> 44 Cong. Rec. 4509, S. J. Res. 40.



criticism of inartistic drafting; for in view of the pre-eminence of the United States Constitution in the carefulness and conciseness of its language, it is a little to ask that amendments be made to conform to the original text.

APPLICATION OF THE RULE IN SHELLEY'S CASE TO GIFTS OF PERSONAL PROPERTY. — "When the ancestor by any gift or conveyance taketh an estate in freehold and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, 'the heirs' are words of limitation of the estate and not words of purchase."<sup>1</sup> This doctrine, known as the Rule in Shelley's Case, has with some qualifications long governed the limitation in deeds and wills of equitable as well as legal estates;<sup>2</sup> and after much controversy it is now settled to be not a mere rule of construction, but a rule of law overriding the intent of the settlor.<sup>3</sup> Although subjected to much adverse judicial comment, and modified or abolished by statute in the majority of our states, the rule as to realty still holds in England and several jurisdictions of this country.<sup>4</sup>

The direct application of the Rule in Shelley's Case to gifts of personal property would be impossible. Aside from any argument based on the much controverted origin of the rule,<sup>5</sup> and the difference in the rules governing future interests in realty and personalty,<sup>6</sup> the very terms "heirs" and "heirs of the body" are inapplicable to personalty.<sup>7</sup> But on its indirect application to personalty<sup>8</sup> the authorities are in great confusion. Much apparent conflict, however, may be explained away. In the first place many decisions cited as authorities for and against the applicability of the rule to personalty are based upon facts which do not include, as they should in order to raise the question, all the requirements which would be necessary for the operation of the rule in realty.<sup>9</sup> Again, many seemingly irreconcilable cases turn upon the construction of wills, and so may be reduced to mere differences in interpretation by the judges of the language employed.<sup>10</sup> And finally much conflict between the early and later decisions is due to the tendency of modern courts to carry out the evident intent of the testator at the expense of technical rules of law.

Though the countless variations in the language used prevent a full classification, the cases most frequently cited for the application of the Rule in Shelley's Case to personalty may be grouped into three divisions. (1) Where the gift is to A for life and after his decease "to his executors,

<sup>1</sup> 1 Rep. 93 b.

<sup>2</sup> Van Grutten v. Foxwell, [1897] A. C. 658; *In re Youman's Will*, [1901] 1 Ch. 720; 2 Washburn, Real Prop., 6 ed., § 1601, § 1610.

<sup>3</sup> Perrin v. Blake, 1 W. Bl. 671; Carpenter v. Van Olinder, 127 Ill. 42. See 11 HARV. L. REV. 418.

<sup>4</sup> Van Grutten v. Foxwell, *supra*; Jones v. Rees, 69 Atl. 785 (Del.). See Washburn, Real Prop., 6 ed., p. 567 note, for list of U. S. statutes.

<sup>5</sup> Van Grutten v. Foxwell, [1897] A. C. 658, 667.

<sup>6</sup> Gray, Rule Perp., 2 ed., §§ 71-98; Williams, Pers. Prop., 16 ed., 356.

<sup>7</sup> Williams, Pers. Prop., 16 ed., 363.

<sup>8</sup> The cases seem to draw no distinction between chattels real and chattels personal.

<sup>9</sup> Thus words similar to those used in the following cases as to personalty would not have fallen within the rule if used as to realty. Bennett v. Bennett, 217 Ill. 434; Vogt v. Vogt, 26 App. D. C. 46; Hughes v. Cannon, 21 Tenn. 589.

<sup>10</sup> See Jones v. Rees, *supra*, quoting 4 Kent, Comm., 12 ed., 534.

administrators and assigns," A has been held entitled to an absolute interest.<sup>11</sup> As this result is only giving effect to the expressed intent of the testator, to explain it as an example of the operation of the Rule in Shelley's Case, a rule not of construction but of law, seems absurd.<sup>12</sup> (2) Bequests to A for life, remainder "to the heirs of his body" have quite uniformly been held to pass an absolute interest to A.<sup>13</sup> Here the Rule in Shelley's Case is involved, but only incidentally as a preliminary step in the operation of a broader rule, a rule of construction to the effect that where in a bequest of personalty words are used which would pass an estate tail in realty, the legatee takes an absolute interest.<sup>14</sup> Since in realty the Rule in Shelley's Case would, as a matter of law, entitle A in a bequest like that above to an estate tail, by this rule of construction he receives an absolute interest in personalty. But it has been suggested that this rule of construction should more properly be framed so as to pass an absolute interest in personalty only when such words are employed as would, in a devise of realty, *show an intent* to give an estate tail.<sup>15</sup> And such is the tendency of the modern decisions.<sup>16</sup> In accordance with this suggestion, whatever may be the form of language used in subsequent limitations, an intent on the part of the testator to restrict the first taker to a life estate in personalty should be effectuated, even though the arbitrary Rule of Shelley's Case would give an estate tail by the same limitations in realty. This view finds support at least where the language used varies from the technical form "heirs of the body," as when the gift is to A for life and then "to his issue."<sup>17</sup> (3) There are several cases where a bequest to A for his life and after his decease "to his heirs" has been held to vest an absolute interest in A.<sup>18</sup> As these words would by the Rule in Shelley's Case give a fee simple in realty there is no chance for the application of the rule of construction employed in the previous class of cases; hence the courts have been tempted to go the full length and apply the Rule of Shelley's Case "by way of analogy."<sup>19</sup> But as the rule thus applied has been held to yield to a contrary intent on the part of the testator, it is plainly used as a mere rule of construction.<sup>20</sup> And to borrow in this way an arbitrary rule of law the object of which, it may be said, is to defeat intention, for use as a test in the determination of such intent is fantastic. Accordingly, the more recent English authorities and several jurisdictions in this country are opposed to such an application of the rule.<sup>21</sup> Nor should the

<sup>11</sup> *Avern v. Lloyd*, L. R. 5 Eq. 383; *Hames v. Hames*, 2 Keen 646. Cf. *Alger v. Parrott*, L. R. 3 Eq. 328.

<sup>12</sup> *Kales*, *Future Interests*, § 135 and cases cited.

<sup>13</sup> *Elton v. Eason*, 19 Ves. Jr. 73; *Butterfield v. Butterfield*, 1 Ves. 133; *Williams v. Lewis*, 6 H. L. Cas. 1013 (Leasehold).

<sup>14</sup> *Polk v. Faris*, 9 Yerg. (Tenn.) 209; *Machen v. Machen*, 15 Ala. 373. See also authorities cited in note 13, *supra*.

<sup>15</sup> *Gray*, *Rule Perp.*, 2 ed., § 647 n. 3; *In re Jeaffreson's Trusts*, L. R. 2 Eq. 276, 280.

<sup>16</sup> *In re Bishop & Richardson's Contract*, [1899] 1 I. R. 71; *Tingley v. Harris*, 20 R. I. 517.

<sup>17</sup> *Ex parte Wynch*, 5 DeG. M. & G. 188; *Foster v. Wybrants*, 11 R. 11 Eq. 40 (Leasehold); *Heiss' Estate*, 1 Pa. C. C. 397. Cf. *Cleveland v. Havens*, 13 N. J. Eq. 101.

<sup>18</sup> *Appeal of Cockins*, 111 Pa. St. 26; *Horne v. Lyeth*, 4 Har. & J. (Md.) 431 (Leasehold).

<sup>19</sup> *Taylor v. Lindsay*, 14 R. I. 518; *Glover v. Condell*, 163 Ill. 566.

<sup>20</sup> *Bucklin v. Creighton*, 18 R. I. 325. But cf. *Hughes v. Nicklas*, 70 Md. 484.

<sup>21</sup> *Smith v. Butcher*, 10 Ch. D. 113. (*Comfort v. Brown*, 10 Ch. D. 146, *contra*, was



circumstance sometimes relied upon, that realty and personalty are disposed of in the same clause, make a difference; for it has long been held that the same words when used in connection with different subjects may bear different constructions.<sup>22</sup>

The problem under discussion was presented in a recent case where realty and personalty were left upon trust to pay the income in equal shares "to A and B during their lives, and upon the death of either, her share to go to her heirs" until one half the principal had been paid to them. In accordance with both reason and authority it was held that the Rule in Shelley's Case applied to the gift of realty but not to the gift of personalty. *Lord v. Comstock*, 88 N. E. 1012 (Ill.).

TIME AS OF WHICH THE VALUE OF DOWER IS COMPUTED. — On the death of her husband a wife's right is to an assignment for life of lands one third in value of all those of which at any time during coverture the husband was seised; as of what time value is to be computed is a point upon which authorities have disagreed for centuries. From the earliest times it has been reasonably clear that where property of which a woman is dowable fluctuates in value after the death of the husband and before the assignment by the heir, her interest shall be set off on the basis of the changed value.<sup>1</sup> Plowden,<sup>2</sup> indeed, while admitting that ameliorations in the quality of the soil would inure to her, queried the right of a wife to profit by "collateral improvements"; but the distinction was not adopted. Early authority<sup>3</sup> was, however, cited by classic text writers<sup>4</sup> for the proposition that as to land aliened by the husband permanent improvements subsequently made were not to enhance the share of the wife. But in the case<sup>5</sup> which founded the modern English law of the subject a wife was, as to property which had been improved after alienation by the husband and before his decease, declared dowable at the higher rate. And a recent decision establishes in England the widow's right to share in all advances from natural or artificial causes in the hands alike of alienee or heir up to the moment when her interest is set off. *Williams v. Thomas*, [1909] 1 Ch. 713 (Eng., Ct. App., Mch., 1909).

Before its repudiation in England, however, this distinction between alienees of the husband and his heirs or devisees, was recognized in this country;<sup>6</sup> and it continues to be law to-day. In all the states a wife may share in appreciation from natural causes while the property remains unassigned in the hands of heir or devisee;<sup>7</sup> and the rule is almost every-

disregarded in *In re Bishop & Richardson's Contract*, *supra*; *Jones v. Rees*, 69 Atl. 785 (Del.).

<sup>22</sup> *Forth v. Chapman*, 1 P. Wms. 663; *Herrick v. Franklin*, L. R. 6 Eq. 593; *Heiss Estate*, 1 Pa. C. C. 397. But a different rule might be followed where the personality is an adjunct to the realty. See *Jackson v. Calvert*, 1 J. & H. 235, 238.

<sup>1</sup> Fitzh. Abr. Tit. Voucher, 298.

<sup>2</sup> Plowd. Qu. 46.

<sup>3</sup> M. 17 H. 3 cited in Fitzh. Abr. Tit. Dower, 192.

<sup>4</sup> Co. Lift. 32 a; Perk. Conveyancing, § 328.

<sup>5</sup> *Doe d. Riddell v. Gwinnell*, [1841] 1 Q. B. 682.

<sup>6</sup> *Powell v. Monson*, etc., Man'f. Co., 3 Mason, 347.

<sup>7</sup> *Catlin v. Ware*, 9 Mass. 218.

where the same as to appreciation from artificial causes.<sup>8</sup> But advances through the efforts of a transferee of the husband<sup>9</sup> do not benefit the wife. Some cases,<sup>10</sup> against the great weight of authority,<sup>11</sup> apply the same rule even to the case of unassisted appreciation during the stranger's possession.

The technical reasons for differentiating the transferee of the husband from the heir or devisee are not altogether satisfactory. That an alienee should not be liable to the wife for more than he can recover from the heir on a common-law warranty<sup>12</sup> is not a consideration which should survive the existence of the common-law warranty itself. To say that it is the heir's folly to postpone the assignment to the improvements,<sup>13</sup> is in part to beg the question; for the act is foolish primarily because the law penalizes it. The voluntary nature of an alienee's improvements has been declared a reason for the widow's not sharing in them;<sup>14</sup> but such an argument would as well apply to improvements by an heir. The courts have relied most strongly upon the desirability of protecting an alienee in his outlays.<sup>15</sup> This applies with obvious force to the period between the alienation and the death of the husband. But it is hard to see wherein after the death the position of an alienee differs from that of an heir: each may at once assign dower and thereafter be free to make improvements on his own property. And there are intimations in the decisions that an alienee will not be protected if he improves after the death,<sup>16</sup> or after he has notice thereof.<sup>17</sup> The latter suggestion accords with a general principle<sup>18</sup> allowing an occupier of property under color of title the value of such improvements only as he has effected in good faith;<sup>19</sup> the former would establish the rule, applicable to heir and transferee alike, that a woman has no interest in improvements, other than her husband's, during coverture, but may share in all increases, naturally or artificially caused, after his death has consummated her right. However, the only case found in which argument was made, for a difference in result as to an alienee's improvements before and after the husband's death, rejects such a distinction.<sup>20</sup>

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THE CONNECTION OF INDEPENDENT TELEPHONE COMPANIES. — The public nature of telegraph and telephone systems was early recognized and individuals or corporations operating them were subjected to the con-

<sup>8</sup> *Westcott v. Campbell*, 11 R. I. 378. *Contra*, *Manning v. Laboree*, 33 Me. 343.

<sup>9</sup> *McClanahan v. Porter*, 10 Mo. 746. In *Campbell v. Murphy*, 2 Jones Eq. (N. C.) 357, the court gave the widow no share in improvements by the heir's transferee. This result seems hard to reconcile with any principle; such transferee must surely take subject to all the incidents of the widow's common law right of dower.

<sup>10</sup> *Tod v. Baylor*, 4 Leigh (Va.) 498. In New York the attainment of this result must be ascribed to the influence of statute. *Shaw v. White*, 13 Johns. (N. Y.) 179.

<sup>11</sup> *Allen v. McCoy*, 8 Oh. 418.

<sup>12</sup> *Thompson v. Morrow*, 5 Serg. & R. (Pa.) 289. The origin of this explanation is to be found in the Hale MSS. cited in *Hargr. Co. Litt.* 32 a, n. (8).

<sup>13</sup> *Catlin v. Ware*, *supra*.

<sup>14</sup> *Thompson v. Morrow*, *supra*.

<sup>15</sup> *Powell v. Monson, etc.*, *Man'f. Co.*, *supra*.

<sup>16</sup> *Price v. Hobbs*, 47 Md. 359, 388.

<sup>17</sup> *Felch v. Finch*, 52 Ia. 563.

<sup>18</sup> *Viner's Abr. Tit. Discount*, 1-4.

<sup>19</sup> *Bright v. Boyd*, 1 Story (U. S.) 478.

<sup>20</sup> *Van Dorn v. Van Dorn*, 3 N. J. L. 270.



trol of the common law over public service.<sup>1</sup> Thus, under the duty to furnish equal facilities to all,<sup>2</sup> both telegraph and telephone companies are obliged to forward respectively telegrams and telephone messages coming over the lines of neighboring, even though competing, companies.<sup>3</sup> Somewhat analogous to this is the obligation of a railroad to transmit freight brought to it by a connecting line.<sup>4</sup> However, there is no common law obligation on a carrier to allow to pass over its tracks the traffic of a connecting carrier, which would be a decided inconvenience to it; nor is a telegraph company bound to join its wires to those of another company, although some slight mutual benefit would usually result; and it would seem to follow that a telephone company is not required to connect its switchboard. But as the relayed transmission of a telephone message does not give the personal communication which makes the telephone more serviceable than the telegraph, and as a switchboard connection would be a decided mutual advantage to the customers of the two lines, the courts might have compelled such an arrangement.<sup>5</sup> They have recently gone so far as to refuse to allow the discontinuance of a switchboard connection when once established. *State ex rel. Goodwin v. Cadwallader*, 87 N. E. 644 (Ind.).

The important question then arises, whether a system which has permitted such a connection with one company is bound to offer an equal advantage to all companies of that class and locality. This has been answered by a recent decision to the effect that a contract by one company to give exclusive connection to another company is unenforceable as tending to create a monopoly and as a contract by a public servant involving discrimination of service. *United States Telephone Co. v. Central Union Telephone Co. et al.*, 171 Fed. 130 (C. C., N. D. Ohio). This case is compared to those known as the Express and Hackmen cases, which present a conflict as to whether a railroad may give exclusive rights to any express or carriage company.<sup>6</sup> But even if a railroad may grant a monopoly of such dependent services, it does not follow that it may bind itself to permit only one road, for instance, to run a through train over its tracks. Having once, by such a contract made itself a highway for railroad traffic it would then come under the duty to render equal facilities to all; so that the provision making the arrangement exclusive would be ineffectual. Similarly, a switchboard connection between two telephone companies cannot be made exclusive. Thus, as the situation usually presents itself, a long distance company must not discriminate in its local connections, nor a local company in its long distance connections; and although at present the courts do not compel such a connection in the first instance, when once it has been established they will prevent its discontinuance.

The cases under discussion are at present the only decisions directly

<sup>1</sup> See 15 HARV. L. REV. 309.

<sup>2</sup> *Delaware & A. Telegraph & Telephone Co. v. State of Delaware ex rel. Postal Telegraph Cable Co.*, 50 Fed. 677.

<sup>3</sup> *State ex rel. Gwynn v. Citizens' Telephone Co.*, 61 S. C. 83.

<sup>4</sup> A complete discussion of the analogous cases referred to will be found in an article in 22 HARV. L. REV. 564.

<sup>5</sup> This course has been taken by legislation which is held to be constitutional. *Billings Mutual Telephone Co. v. Rocky Mountain Bell Telephone Co.*, 155 Fed. 207.

<sup>6</sup> *Donovan v. Pennsylvania Co.*, 199 U. S. 279; *Express Cases*, 117 U. S. 1. See 20 HARV. L. REV. 526.

on this point,<sup>7</sup> and the opinions, which recognize the distinction between the services rendered by a telephone company and other methods of transferring intelligence or matter, should be controlling in future litigation of the kind.

CONSTRUCTIVE POSSESSION UNDER COLOR OF TITLE. — Ordinarily the acquisition of realty by means of an adverse holding is limited to the *pedis possessio*, or actual occupation.<sup>1</sup> In contemplation of law, however, adverse possession is sometimes extended to apply to unoccupied lands held under color of title. This doctrine of constructive possession has been almost wholly developed in this country and Canada where it has been found well adapted to the exigencies of unsettled regions.<sup>2</sup> England has never fully admitted the refinement.<sup>3</sup>

Of the requirements for a constructive adverse possession several are universally admitted, while as to others there is a decided conflict. (1) There must be color of title; namely, that which has the appearance of title but which is in fact none.<sup>4</sup> Almost universally some instrument is required,<sup>5</sup> and decisions which allow color of title without a writing are really authorities on what constitutes a sufficient *actual* possession.<sup>6</sup> The writing must accurately describe the premises and must purport to convey title.<sup>7</sup> It appears, therefore, that color of title is important in showing first, the character of the claim, and second, its extent.<sup>8</sup> In a recent decision it is properly regarded as a piece of evidence. *Roe v. Tennessee Ry. Co.*, 50 So. 230 (Ala.). (2) There must be a claim of ownership as well as color of title, and hence the instrument must purport to convey a fee.<sup>9</sup> (3) There must be an actual possession of part of the land indicative of a further claim. The function of this requirement is to give notice of the adverse claim and to afford ground for a possessory action.<sup>10</sup> So it is not enough that the actual possession be only of the claimant's own land;<sup>11</sup> and any alienation of the *pedis possessio* is fatal.<sup>12</sup> Whether or not the part constructively held must be a reasonable appendage of the part actually possessed, is disputed; the slight weight of authority leaning against such requirement.<sup>13</sup> (4) As to

<sup>7</sup> But *cf.* *Rural Home Telephone Co. v. Kentucky & I. Telephone Co.*, 107 S. W. 787; *Campbellsville Telephone Co. v. Lebanon L. & L. Telephone Co.*, 118 Ky. 277; *Cumberland Telephone & Tele. Co. v. Cartwright Creek Telephone Co.*, 108 S. W. 875; *Matter of Baldwinville Telephone Company*, 24 N. Y. Misc. 221.

<sup>1</sup> *Norris v. Ile*, 152 Ill. 190.

<sup>2</sup> *Simpson v. Downing*, 23 Wend. (N. Y.) 315; *McKinnon v. McDonald*, 13 Grant Ch. (N. C.) 152.

<sup>3</sup> In a recent English decision the court declared that constructive possession is to be inferred only to give effect to a contractual obligation. *Glynn v. Howell*, 100 L. T. R. 324 (Ch. Div., May 1, 1909).

<sup>4</sup> *Wright v. Mattison*, 18 How. (U. S.) 50.

<sup>5</sup> *Allen v. Mansfield*, 108 Mo. 343.

<sup>6</sup> *Hodges v. Eddy*, 38 Vt. 327; *Allen v. Holton*, 20 Pick. (Mass.) 458.

<sup>7</sup> *Humphries v. Huffman*, 33 Oh. 395; *Deffback v. Hawke*, 115 U. S. 392.

<sup>8</sup> *Welborn v. Anderson*, 37 Miss. 155.

<sup>9</sup> *Bakewell v. McKee*, 101 Mo. 337; *McLain v. Kan.* 126.

<sup>10</sup> *Bailey v. Carleton*, 12 N. H. 9; *Steedman v. Hilliard*, 3 Rich. (S. C.) 101.

<sup>11</sup> *Bailey v. Carleton*, *supra*.

<sup>12</sup> *Cunningham v. Frandtzen*, 26 Tex. 34.

<sup>13</sup> *Ellicott v. Pearl*, 10 Pet. 412; *Hicks v. Coleman*, 25 Cal. 122. In New York it is



*bona fides* as a requisite, there is also a conflict, but by the decided weight of authority the claimant must have an honest belief in the validity of his title.<sup>14</sup> In some jurisdictions nothing less than fraud in securing the color of title constitutes *mala fides*.<sup>15</sup> On principle the only defense of good faith as a requirement for constructive adverse possession, though not for actual adverse possession, is the desire to restrict the scope of the former; for the doctrine of adverse possession is in reality extended to cases of claims under colorable title, not because of a *bona fide* reliance on the deed, but because the paper title is evidence of the extent of the claim.

The fiction of constructive adverse possession may be justified only if the disseisee must have notice of the claim and its extent. That an adverse claim exists, the actual possession of a part serves as notification; the color of title is evidence of the extent and nature of the claim.<sup>16</sup> If the color of title, therefore, is accessible to the true owner, he is reasonably chargeable with notice of the extent of the claim.<sup>16</sup> But it is not universally required that the color of title be recorded;<sup>17</sup> and to apply the doctrine of constructive possession under such circumstances is totally to disregard the principle underlying all adverse possession; namely, that the disseisee is justly chargeable with laches where the possession is such as is calculated to inform him of its existence.<sup>18</sup> In a number of states, statutes obviate this hardship by requiring the color of title to be recorded.<sup>19</sup>

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WHAT CONSTITUTES AN INSURABLE INTEREST IN A LIFE. — Although doubts may exist in a few jurisdictions,<sup>1</sup> an insurable interest is, by statute or otherwise, almost universally requisite to the validity of a contract of life insurance;<sup>2</sup> for without such an interest the contract would be opposed to public policy, both as being a wager and as placing upon the insured a dangerous temptation to bring to pass the event upon which recovery rests.<sup>3</sup> As to what constitutes an insurable interest in a life the language of the courts has been at times confusing, although the actual decisions are less conflicting than the opinions might indicate.

The decisions may properly be divided into three classes. (1) Whenever the life is under a definite legal obligation to the insured, the performance of which would be rendered impossible or seriously hampered by death, the insured has a very real interest in the continuation of the life, and the policy is valid. So a master has an insurable interest in the life of a servant

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well established that constructive possession is limited to a small tract. *Thompson v. Burhans*, 79 N. Y. 93.

<sup>14</sup> *Godfrey v. Dixon*, 228 Ill. 487; *Smith v. Young*, 89 Ia. 338. *Contra*: *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Roe v. Tenn. Ry. Co.*, 50 So. 230 (Ala.).

<sup>15</sup> *Foulke v. Bond*, 41 N. J. L. 527, 541.

<sup>16</sup> *Bailey v. Carleton*, *supra*.

<sup>17</sup> *Avent v. Arrington*, 105 N. C. 377, 389; *Jones v. Perry*, 10 Yerg. (Tenn.) 59. *Contra*, *Nye v. Alfter*, 127 Mo. 529.

<sup>18</sup> *Foulke v. Bond*, *supra*; *Bailey v. Carleton*, *supra*.

<sup>19</sup> *Breckenridge Co. v. Scott*, 114 S. W. 930 (Tenn.); *Holland v. Ferris*, 114 S. W. 845 (Tex.).

<sup>1</sup> *Trenton Mutual Life & Fire Insurance Co. v. Johnson*, 24 N. J. L. 576.

<sup>2</sup> 1 Cooley, *Briefs on Insurance*, 246.

<sup>3</sup> *Ruse v. Mutual Benefit Life Insurance Co.*, 23 N. Y. 516. See *Cooke on Life Insurance*, § 58.

to whose service he has a legal claim;<sup>4</sup> an employee under a contract for a term of years may insure the life of his employer;<sup>5</sup> and a creditor may insure the life of his debtor.<sup>6</sup> A father, being entitled to the services of a minor child has an insurable interest in the latter's life.<sup>7</sup> And as the father is under a legal obligation to support a minor child, the child has a like interest in the life of the father.<sup>8</sup> For the same reason, a wife may insure the life of her husband.<sup>9</sup> (2) In another class of cases it appears that there may be an insurable interest without a definite legal obligation or liability. It is enough if there is a reasonable certainty that the continuation of the life will be of direct, material advantage to the insured, but if such benefit would be only indirect or uncertain the requirement as to insurable interest is not satisfied.<sup>10</sup> So a sister may insure the life of a brother on whom she is dependent for support.<sup>11</sup> In some of the cases it has been said that in the absence of definite legal obligation of the life to the insured, some relationship between the life and the insured is essential.<sup>12</sup> This view however finds little support.<sup>13</sup> The fact of relationship is especially emphasized in the recent case of *Griffiths v. Fleming*, 100 L. T. R. 765, where it is held that a husband has an insurable interest in the life of his wife merely because of their relation.<sup>14</sup> There are several decisions and numerous *dicta* to the same effect.<sup>15</sup> A more sound explanation, however, is that relationship of itself does not constitute an insurable interest, but that it often gives rise to circumstances which properly bring a case within this second class.<sup>16</sup> (3) A very few cases hold that one upon whom the continuation of a life would bring further liability may effect a valid insurance on the life as reimbursement for future expenditures.<sup>17</sup> But as every interest of the insured, in such a case, lies in shortening the life, the insurance seems clearly against public policy.

The only generally admitted instance of valid life insurance which would come under none of the classes herein outlined is self-insurance. Just how to define the interest of a man in his own life is difficult, for recovery can come only after the death of the person assured. The suggestion that his

<sup>4</sup> *Miller v. Eagle Life & Health Insurance Co.*, 2 E. D. Smith (N. Y.) 268; *Bevin v. Connecticut Mutual Life Insurance Co.*, 23 Conn. 244.

<sup>5</sup> *Hebdon v. West*, 3 B. & S. 579.

<sup>6</sup> *Amick v. Butler*, 111 Ind. 578. See *Ulrich v. Reinoehl*, 143 Pa. St. 238.

<sup>7</sup> *Mitchell v. Union Life Insurance Co.*, 45 Me. 104.

<sup>8</sup> *Geoffroy v. Gilbert*, 5 N. Y. App. Div. 98.

<sup>9</sup> *Lewis v. Palmer*, 106 Va. 522.

<sup>10</sup> See *Wilton v. New York Life Insurance Co.*, 34 Tex. Civ. App. 156.

<sup>11</sup> *Lord v. Dall*, 12 Mass. 115. See *Cronin v. Vermont Life Insurance Co.*, 20 R. I. 570.

<sup>12</sup> *Trinity College v. Travelers Insurance Co.*, 113 N. C. 244.

<sup>13</sup> In *Carpenter v. U. S. Life Insurance Co.*, 161 Pa. St. 9, a young girl adopted into a man's family was held to have an insurable interest in his life. A woman has an insurable interest in the life of a man who supports her and with whom she lives as wife although not legally married. *Equitable Life Assurance Society v. Paterson*, 41 Ga. 338, 305.

<sup>14</sup> The same result has been reached in this country but on the ground that a husband has a right to his wife's services. *Currier v. Continental Life Insurance Co.*, 57 Vt. 496.

<sup>15</sup> *Grattan v. National Life Insurance Co.*, 15 Hun (N. Y.) 74; *Woods v. Woods*, 113 S. W. 79 (Ky.). See *Loomis v. Eagle Life & Health Insurance Co.*, 72 Mass. 396.

<sup>16</sup> *May on Insurance*, 4 ed., § 107.

<sup>17</sup> *Reserve Mutual Insurance Co. v. Kane*, 81 Pa. St. 154. See *Life Insurance Clearing Co. v. O'Neill*, 106 Fed. 800, 806.



estate, as the continuation of the *persona* of the assured, has the required interest seems not entirely satisfactory. Plainly, however, it is desirable that a man should be allowed to provide for his family in this way, and the courts have not hesitated to uphold such policies.<sup>18</sup>

WHO MAY EXECUTE A TRUST UPON DEATH OF THE TRUSTEE. — At common law the administrator of a trustee, *simpliciter*, has no right to perform the trust.<sup>1</sup> And when property is vested in A "and his heirs" upon a special trust, neither a devisee<sup>2</sup> nor an assignee *inter vivos*<sup>3</sup> is competent to execute it. If, however, property is vested in A, "his heirs and assigns," upon a special trust, the trust may be executed by a devisee of A, considered as a testamentary assignee,<sup>4</sup> but not by an assignee *inter vivos*.<sup>5</sup> The fact that in determining the power of a trustee the intent of the settlor is absolutely controlling is well brought out in a recent decision holding that as the discretionary power of a trustee to apply the principal of a trust fund for the benefit of the cestui is a matter of personal confidence, it cannot be exercised by a trustee appointed by the court upon the death of the original trustee. *Whitaker v. McDowell*, 72 Atl. 938 (Conn.). And it has also recently been held that the heir of the last survivor of several trustees to sell land cannot execute the trust or power of sale, because not pointed out in the instrument as one within the contemplation of the settlor.<sup>6</sup> An opposite conclusion reached upon almost identical facts may be distinguished upon the ground that the court apparently considered it to have been within the contemplation of the testator that the heir of the surviving trustee should act.<sup>7</sup> In all these cases, however, it must be understood that though the person in question is not indicated in the instrument as one to succeed to the trust, yet once having the legal title he must always hold the property subject to the trust.<sup>8</sup>

A distinction is taken by the courts between cases of trusts to which powers are annexed and cases of mixed trusts and powers. Thus where a deceased trustee had a *duty* to provide for the testatrix's daughter by using a discretionary power, it could be exercised by the trustee appointed by the court as his successor; for the testator had merely outlined the trust in expectation that the details would be arranged according to the judgment of his trustees.<sup>9</sup> In such a case of mixed trust and power, the power is imperative, and must be exercised; only the mode of its exercise is discretionary.<sup>9</sup> But where the power is simply annexed to the trust, the trust is

<sup>18</sup> *Campbell v. New England Insurance Co.*, 98 Mass. 381; *Judson v. Walker*, 155 Mo. 166.

<sup>1</sup> *Mortimer v. Ireland*, 11 Jur. 721.

<sup>2</sup> *In re Morton & Hallett*, 15 Ch. D. 143. But see *Osborne v. Rowlett*, 13 Ch. D. 774.

<sup>3</sup> *Bradford v. Belfield*, 2 Sim. 264.

<sup>4</sup> *Titley v. Wolstenholme*, 7 Beav. 425.

<sup>5</sup> *Whittelsey v. Hughes*, 39 Mo. 13.

<sup>6</sup> *Re Crunden & Meux's Contract*, 100 L. T. R. 472 (Ch. Div., May, 1909).

<sup>7</sup> *In re Pixton & Tony's Contract* (1897), 46 W. R. 187.

<sup>8</sup> See Ames, *Cases on Trusts*, p. 226, n. 1-2.

<sup>9</sup> *Osborne v. Gordon*, 86 Wis. 92.

complete in itself, and the power may or may not be exercised.<sup>10</sup> The courts will never compel the exercise of this power in the first instance.<sup>11</sup> And they are unanimous in declaring that to the extent to which discretionary power is vested in a trustee they cannot interfere in its reasonable exercise, in the absence of bad faith or fraud.<sup>12</sup> In view, therefore, of the freedom granted to holders of discretionary powers, it seems doubly wise that they should be limited to persons appearing to have been within the contemplation of the creator of the trust.<sup>13</sup>

## RECENT CASES.

ADMIRALTY — TORTS — PRIORITY OF MARITIME LIENS. — A tug collided with three vessels, at different times. The owners of each filed libels, but the proceeds of sale were insufficient to satisfy all three decrees. *Held*, that the liens are entitled to priority in inverse order of the collisions. *The America*, 168 Fed. 424 (D. C., N. J.).

American admiralty law regards a vessel as a responsible thing, having capacity to make contracts and commit torts. See *The John G. Stevens*, 170 U. S. 113. A person damaged by her acquires a maritime lien, a proprietary interest, enforceable, regardless of the liability of the owner, by a libel directly against the vessel. *The Barnstable*, 181 U. S. 464. No importance is attached to the time of obtaining the decree. *The J. W. Tucker*, 20 Fed. 129. It is settled that a lien for tort has precedence over a lien for previous supplies. *The John G. Stevens*, *supra*. The doctrine of such cases is that when the vessel continues in navigation, the lienholder necessarily submits his interest to all maritime perils, one of which is the liability of the vessel for torts. *The America*, Fed. Cas. No. 288; *The Frank G. Fowler*, 8 Fed. 331. It has been urged that as the first lien is good against a purchaser without notice, it ought not to be prejudiced by any subsequent interest. *The Frank G. Fowler*, 17 Fed. 653. The basis for the second lien, however, is not a contract, but the absolute liability of the vessel for her wrongs. Hence the holding of the principal case is strictly in accordance with admiralty principles.

ADVERSE POSSESSION — CONSTRUCTIVE POSSESSION — COLOR OF TITLE. — X gave Y a deed for land which covered more than the land which X actually owned. *Held*, that the fact that title to a part of the land actually passed does not prevent the acquisition of constructive possession under the deed. *Roe v. Tenn. Ry. Co.*, 50 So. 230 (Ala.). See Notes, p. 56.

AGENCY — AGENT'S LIABILITY TO THIRD PERSONS — PROMISSORY NOTE SIGNED BY AUTHORIZED AGENT. — A promissory note was signed as follows: "J. H. Smethurst's Laundry and Dye Works Limited, — J. H. Smethurst, Managing Director." The words J. H. Smethurst were written by the defendant, and the rest of the signature was impressed by a rubber stamp. *Held*, that the defendant is not personally liable on the note. *Chapman v. Smethurst*, 100 L. T. R. 465 (Eng., Ct. App., Mch. 4, 1909).

An agent who puts his name to a note, without making it appear upon the face of the note that it was intended that only the principal should be liable, will be

<sup>10</sup> *Cole v. Wade*, 16 Ves. 27.

<sup>11</sup> *French v. Northern Trust Co.*, 197 Ill. 30.

<sup>12</sup> *Hallinan v. Hearst*, 133 Cal. 645.

<sup>13</sup> See *In re Rumney & Smith*, [1897] 2 Ch. 351.



liable thereon. *Price v. Taylor*, 5 H. & N. 540. Besides naming his principal, an agent must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101. This is sufficiently expressed, if the face of the instrument, when interpreted as it would generally be understood, shows that the parties intended that the principal only should be liable. *Liebscher v. Kraus*, 74 Wis. 387. *Contra*, *Hefner v. Brownell*, 70 Ia. 591. The same result has been reached under the Negotiable Instruments Law, which provides that when an instrument contains words indicating that the agent signs for or on behalf of a principal, he is not liable on the instrument, if duly authorized. See N. Y. Laws 1897, c. 612. *Western Grocer Co. v. Lackman*, 75 Kan. 34. The principal case finally disposes of a *dictum* by Lord Ellenborough that the agent whose name appears on a negotiable instrument, will be liable thereon, unless it also appears in so many words that he subscribes for another. See *Leadbitter v. Farrow*, 5 M. & S. 345.

AGENCY — PRINCIPAL'S LIABILITY TO THIRD PERSONS IN TORT — RESPONDEAT SUPERIOR NOT APPLIED TO GRATUITOUS SERVICE. — The defendant's servants were authorized to give away old barrels. The plaintiff was injured through the negligence of the defendant's employee in throwing such a barrel to the plaintiff's companion. *Held*, that the defendant is not liable. *Wallace v. John A. Casey Co.*, 132 N. Y. App. Div. 35.

The weight of American authority exempts charitable corporations from liability for their servants' negligence on the ground that it would be unjust to subject the master to the incidental burdens of the servant's employment, when he derives no pecuniary benefit therefrom. *Hearns v. The Waterbury Hospital*, 66 Conn. 98; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432. Upon this theory there is no logical ground for distinguishing charitable corporations from business corporations or individuals dispensing charitable gifts. See *Union Pac. Ry. Co. v. Artist*, 60 Fed. 365. As the recipient, and not the dispenser of the charity, is the real beneficiary of the servant's labor, this doctrine seems just. *Cf. Powers v. Massachusetts Homœopathic Hospital*, 101 Fed. 896. The theory has been advanced that the recipient, by accepting a charity, waives the responsibility of the master for the servant's negligence. See *Kellogg v. Church Charity Foundation of Long Island*, 128 N. Y. App. Div. 214. The present case expresses the same idea in another form; the recipient must be held to have assumed the risk of the servant's negligence. The reasoning is analogous to that of the fellow-servant doctrine. *Cf. Farwell v. Boston & Worcester R. R. Corp.*, 4 Met. (Mass.) 49. Although founded on fiction, it seems to lead to a correct result.

BANKRUPTCY — DISCHARGE — EFFECT UPON OBLIGATIONS OF BANKRUPT AS LESSEE. — After renewing his lease, but before the beginning of the new term, a lessee filed a voluntary petition in bankruptcy. After the beginning of the new term, he was adjudged a bankrupt and discharged. Under a statute giving the landlord a lien on the tenant's goods for the entire rent to accrue, the landlord attached the stock of goods allowed to the bankrupt as an exemption. *Held*, that the landlord has a lien for future rent. *Shapiro v. Thompson*, 49 So. 391 (Ala.).

A tenant's discharge in bankruptcy does not release him from liability for rent to accrue under a subsisting lease, for it is well settled that future rent is not a provable claim. *Watson v. Merrill*, 136 Fed. 359. The landlord, therefore, must look to the bankrupt personally for his security, unless their relation as landlord and tenant is severed by the adjudication. On this latter point there is a conflict of authority. It has been held that the adjudication *ipso facto* terminates the lease. See *In re Jefferson*, 93 Fed. 948. But the better view appears to be that the leasehold, like any other property of the bankrupt, goes to the trustee, subject to his right of disclaimer. *In re Pennewell*, 119 Fed. 139; *White v. Griffing*, 44

Conn. 437. If the trustee assumes the lease, it becomes an asset of the estate, and is sold for the benefit of creditors. If not, the landlord and tenant remain on the same footing as before. *Ex parte Houghton*, 1 Low. (U. S.) 554. Thus in the principal case the plaintiff is allowed the ordinary statutory remedy of the landlord, as if there had been no bankruptcy.

**BILLS AND NOTES — DEFENSES — EFFECT OF TRANSFER AFTER MATURITY.** — A gave to B his promissory note secured by a mortgage. After maturity of the note, it was agreed that B should transfer the note and mortgage to C, who should hold the note until certain payments were made. Payments were made, but were not indorsed upon the note which C later indorsed to D, a purchaser without notice. *Held*, that D can recover from A, the full amount of the note. *Reardon v. Cockrell*, 103 Pac. 457 (Wash.).

It is fundamental that after maturity a promissory note loses its negotiability and passes by indorsement only such right as the indorser possessed. *Texas v. Hardenburg*, 10 Wall. (U. S.) 68. Thus any defense arising from a defect in the inception of the note or from any subsequent transaction relating to the note, can be urged against one holding by indorsement after maturity, if it would have availed against his indorser. *Freiltenberg v. Rubel*, 123 Ia. 154. See *Zeis v. Potter*, 105 Fed. 671. But this reasoning is applicable only to equities as distinguished from set-offs. When the maker of a note has a claim against the payee, arising out of a transaction wholly unrelated to the note, the English courts have consistently held that an indorsee after maturity is not subject to the set-off. *Burrough v. Moss*, 10 B. & C. 558. American courts are in conflict. *Semmel v. Heuben*, 71 Mo. App. 291. *Contra*, *Driggs v. Rockwell*, 11 Wend. (N. Y.) 504. Jurisdictions which allow the set-off restrict it to debts due at the time of the transfer. *Baxter v. Little*, 6 Met. (Mass.) 7. Some further restrict it to debts due the maker from the payee. *Hayward v. Stearns*, 39 Cal. 58. In the principal case equities are confused with set-offs. If the payments made by A to C were intended as payments upon the note, A acquired an equitable interest in the note which should not have been defeated by its indorsement after maturity. *Elgin v. Hill*, 27 Cal. 372.

**CANCELLATION OF INSTRUMENTS — DEEDS: CANCELLATION FOR FAILURE OF CONSIDERATION.** — The owner of land conveyed it in consideration of the grantee's agreement to care for the grantor during her lifetime and to pay her one-half the proceeds of the land. The grantee failed to account for the proceeds. The grantor filed a bill praying for the cancellation of the deed. *Held*, that the deed should be set aside. *Cumby v. Cumby*, 88 N. E. 549 (Ill.).

It is a general rule that non-performance by the grantee will not entitle the grantor to a cancellation of the deed in equity. *Chicago, Texas, & Mexican Central Ry. Co. v. Tillerington*, 84 Tex. 218. But in cases similar to the present the rule is sometimes avoided by treating the grantee's promise as a condition subsequent. *Knutson v. Bostrak*, 99 Wis. 469. And it has been held that equity acquires jurisdiction and will decree cancellation or reconveyance because such an agreement creates a trust. *Grant v. Bell*, 26 R. I. 288. Another ground suggested for equitable jurisdiction is to prevent a multiplicity of suits by the grantor. *Lowman v. Crawford*, 99 Va. 688. It has also been suggested that there is a legal presumption of fraud arising from the grantee's subsequent conduct. See *Frazier v. Miller*, 16 Ill. 48. Some courts deny the remedy of cancellation, but make the support of the grantor a charge upon the land conveyed. *Watson v. Smith*, 7 Or. 448. But these decisions violate the rule that the grantor's lien exists only in behalf of a liquidated demand. *Harter v. Capital City Brewing Co.*, 64 N. J. Eq. 155. None of the grounds suggested in support of the decision in the principal case seem satisfactory, and the decisions which follow the general rule seem correct. See *Anderson v. Gaines*, 156 Mo. 664.



**CARRIERS — FEDERAL REGULATION — PROFIT ON PARTICULAR SERVICE.** — For unloading and reconsigning hay at an intermediate point the defendant carrier charged the plaintiff an amount exceeding the actual cost of the service to the defendant. The Interstate Commerce Commission awarded to the plaintiff the excess above such cost. *Held*, that as the defendant is entitled to a reasonable profit on such a transaction, the court will not enforce the award. *Southern Railway Co. v. St. Louis Hay & Grain Co.*, 29 Sup. Ct. 679.

No regulation of charges can deprive a public service corporation of a reasonable return on the total investment. *Smyth v. Ames*, 169 U. S. 466. But each particular service to the public need not necessarily render a profit to the corporation. *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1. See 21 HARV. L. REV. 49. Still, when the sovereign compels a service at less than cost there must be shown to be a benefit to the general public, rather than to any class selected for legislative favor. See *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, *supra*, p. 26. And it seems essential that such a demand on the corporation must be justified by showing a necessity for such service. Although the situation in the principal case did not show any such necessity, as the service rendered was not part of the regular transportation but a privilege accorded the shipper, the decision may make the law that for such services a carrier can demand compensation above the actual cost. This view is supported by cases allowing a railroad to collect warehouse charges on freight not promptly removed by a consignee even above those regularly charged by warehousemen. *Miller v. Georgia Railroad & Banking Co.*, 88 Ga. 563.

**CARRIERS — LIEN — UNAUTHORIZED SHIPMENT BY THIRD PARTY.** — The plaintiff shipped machinery to a purchaser, with a reservation of title as security for the payment of the purchase price. Before such payment, a third party, lawfully in possession, shipped the goods on the defendant's railroad, without the plaintiff's express or implied authority. The defendant was ignorant of the plaintiff's ownership. *Held*, that the defendant has no lien for freight and demurrage charges. *Corinth Engine & Boiler Works v. Mississippi Central R. Co.*, 49 So. 261 (Miss.).

In a case like that under discussion, an English court would probably give the carrier a lien, on the ground that he is obliged to carry goods offered for transportation. See *Yorke v. Grenaugh*, 2 Ld. Raym. 866, 867. But in the United States it is recognized that this obligation does not extend to goods offered for shipment by a third party without the owner's authority. See *Robinson v. Baker*, 5 Cush. (Mass.) 137, 145. The reason failing, the rule grounded upon it must fall. Hence our courts have uniformly held that the necessary foundation for a carrier's lien is a debtor and creditor relation between carrier and owner. *Fitch v. Newberry*, 1 Doug. (Mich.) 1. The basis of the American decisions is the universal principle that a man's personal property cannot be taken from him without his consent. To be consistent, our courts should also break with the English law in the analogous case of the innkeeper. The parallel is perfect, except that it is less practicable for the innkeeper to demand payment in advance. Whether the plaintiff in the principal case should have been estopped to deny the conditional vendee's authority to deal with the goods as his own, does not sufficiently appear. *Cf. Vaughan v. The Providence & Worcester R. Co.*, 13 R. I. 578.

**CONSTITUTIONAL LAW — DUE PROCESS OF LAW — COMMITMENT OF DEFENDANT ACQUITTED BECAUSE OF INSANITY.** — A defendant was acquitted of a charge of homicide because of insanity. Under a statutory provision the court thereupon committed him to an asylum. He applied for a discharge under a writ of *habeas corpus*, and later appealed from an order dismissing the writ. *Held*, that the order be affirmed. *People ex rel. Peabody v. Chanler*, 117 N. Y. Supp. 322 (Sup. Ct., App. Div.).

For a discussion of the principles involved, see 22 HARV. L. REV. 218.

**DEATH BY WRONGFUL ACT — STATUTORY LIABILITY IN GENERAL — SUIT BY FOREIGN ADMINISTRATOR.** — An administrator appointed in New Jersey sued in a New York court under a statute of the latter state allowing recovery for death by wrongful act where the deceased leaves a husband or wife or next of kin. *Held*, that the administrator cannot sue without taking out ancillary letters of administration. *Cornell v. Ward*, 168 Fed. 51 (C. C. A., Second Circ.).

It is well settled that apart from statute an administrator or executor appointed in one state has no authority to sue in another. *Willard v. Hammond*, 21 N. H. 382. One reason for the rule is that the letters of administration have no extra-territorial force. See *Vaughn v. Barret*, 5 Vt. 333. But the policy of the rule is to protect foreign creditors of the deceased. See *Terrell v. Crane*, 55 Tex. 81. Thus where the claim cannot be made the subject of local administration, a foreign representative may sue. *Purple v. Whithed*, 49 Vt. 187. Under statutes similar to that in the principal case, the judgment recovered is not subject to the claims of creditors. *O'Connor v. Root*, 130 Ia. 553. And it is generally held that the foreign administrator may sue without having taken out ancillary letters, since he acts, not in his representative capacity, but as trustee for the beneficiaries. *Boulder v. Pennsylvania Railroad Co.*, 205 Pa. St. 264. This view, opposed to that of the principal case, seems clearly correct. But if the action under the statute is for the benefit of the estate, the foreign representative cannot sue. *Maysville St. Ry. & Transfer Co. v. Marvin*, 59 Fed. 91.

**DOWER — ASSIGNMENT OF DOWER — TIME AS OF WHICH VALUE IS COMPUTED.** — An owner of land died intestate in 1885; in 1907 the plaintiff, his widow, commenced action for assignment of dower. In the meantime the property had risen in value. *Held*, that the plaintiff is entitled to have land set off to her equal in value to one third of the whole at the time of assignment. *Williams v. Thomas*, [1909] 1 Ch. 713. See NOTES, p. 53.

**EMINENT DOMAIN — COMPENSATION — INTEREST ON AWARD PENDING APPEAL.** — The plaintiff condemnor deposited the amount of the award at the defendant's disposal, and entered into possession of the condemned property. On appeal, the amount of the award was increased. The defendant demanded interest on the entire amount from the date of the first award. *Held*, that interest runs only on the excess of the second over the first award. *Matter of Water Commissioners of White Plains*, 195 N. Y. 502.

A condemnee ought at no time to be deprived of both property and compensation. Interest is the compensation allowed when he has lost his property and cannot yet get his money. Thus an increased verdict should bear interest on the whole amount from the date of the original award, if payment is delayed until final judgment. *Warren v. St. Paul, etc., Railroad Co.*, 21 Minn. 424. The same is true if a deposit is made, or security given, which is not at the condemnee's disposal. *Sioux City, etc., Railroad Co. v. Brown*, 13 Neb. 317. In both these cases there is an interval during which the condemnor holds the property and the condemnee is without compensation. If, however, the amount of the original award is at the condemnee's disposal, it is his own fault if the sum lies idle, and interest should run only on the excess. *St. Louis, etc., Ry. Co. v. Fowler*, 113 Mo. 458, 473. *Contra*, *Neilson v. C. & N. W. Ry. Co.*, 91 Wis. 557. This rule protects both parties, giving the condemnee fair compensation, but permitting no profit from prolonged litigation.

**EVIDENCE — PROOF OF FOREIGN LAW — APPLICATION OF LEX FORI.** — The plaintiff brought an action to recover for personal injuries suffered in Cuba, through the defendant's negligence. *Held*, that in absence of proof of Cuban law, the law of the forum will be applied. *Cuba R. Co. v. Crosby*, 170 Fed. 369 (C. C. A., Third Circ.).

The court decides the case according to the common law of the forum, without



taking judicial notice of, or making any presumption in regard to, the foreign law. To attain a similar result, courts have, in absence of proof of foreign law, presumed it to be the same as the *lex fori*. *Linton v. Moorehead*, 209 Pa. St. 646. This presumption may well be applied to jurisdictions like England and those American states which have always been under an English system of law. See *Norris v. Harris*, 15 Cal. 226. But it cannot logically be applied to such foreign countries as France or Turkey, since it is judicially known that the common law is not there in force. *Re Hall*, 61 N. Y. App. Div. 266. See *Aslanian v. Dostumian*, 174 Mass. 328. But a recent case shows a somewhat far-fetched refinement. A Missouri court refused to presume that the common law existed in Kansas, on the theory that Kansas was not carved out of English territory, but was acquired from France. See *Mathieson v. St. Louis & S. F. Ry. Co.*, 118 S. W. 9 (Mo.). The rule laid down by the principal case is simple and capable of universal application, but it overlooks the fact that the defendant's liability depends entirely upon Cuban law. *Slater v. Mexican National R. R. Co.*, 194 U. S. 120. The plaintiff, not having established this liability, has made out no case. For a further discussion of this subject, see 19 HARV. L. REV. 401-417.

**HOMESTEAD — CONTRACT TO CONVEY SIGNED BY HUSBAND ALONE.** — The defendant's wife refused to join in a conveyance of the homestead pursuant to a contract entered into by the defendant but not signed by herself. The defendant then refused to convey his interest. By the constitution of Michigan deeds of homesteads not signed by the wife are void. *Held*, that the defendant is not liable in an action at law for breach of contract. *Lawrence v. Vin Kemulder*, 122 N. W. 88 (Mich.).

Specific performance manifestly cannot be had against a husband who is incapable alone of making a valid conveyance. *Mundy v. Shellabarger*, 153 Fed. 219. But inability to perform is not of itself an excuse for a breach of contract. Thus a person who obligates himself to convey land over which he has not the power of disposal, is ordinarily answerable in damages. *Carr v. Dooley*, 19 N. Y. Misc. 553. And a husband who covenants to give perfect title and is prevented from so doing by his wife's dower right, is liable upon his covenant. *Drake v. Baker*, 34 N. J. L. 358. The principal case can be supported only on the ground of public policy. The argument is that the liability of the husband upon his contract operates to coerce the wife to sign the deed against her better judgment. *Weitzner v. Thingstad*, 55 Minn. 244. But ordinarily, freedom from liability would be used by the husband simply as a means of escape from an unprofitable bargain. Hence it seems wiser to make no exception to the usual rule of contracts. *Eberling v. Deutscher Verein*, 72 Tex. 339.

**INSURANCE — INSURABLE INTEREST — WHAT CONSTITUTES INSURABLE INTEREST IN A LIFE.** — *Held*, that the relation of husband and wife *per se* gives to the husband an insurable interest in the life of the wife. *Griffiths v. Fleming*, 100 L. T. R. 765 (Eng., Ct. App., Mch. 2, 1909). See NOTES, p. 57.

**INSURANCE — INSURABLE INTEREST — WHETHER NECESSARY IN ASSIGNEE OF LIFE POLICY.** — X took out a policy of insurance on his own life. Later, he assigned it to Y, who had no insurable interest in life of the assured. On the death of X the insurer paid the money due into court and filed a bill of interpleader against Y and X's administrators. *Held*, that the assignee can recover only what he actually paid for the assignment and as premiums. *Russell v. Grigsby*, 168 Fed. 577 (C. C. A., Sixth Circ.).

A distinct conflict of authority exists as to the validity of an assignment of a life policy to one having no insurable interest in the life. Most jurisdictions hold that such a policy, valid in its inception, is merely a chose in action which modern commercial needs require to be freely assignable as such. *St. John v. American Mutual Life Insurance Co.*, 13 N. Y. 31; *Gordon v. Ware National Bank*, 132

Fed. 444. And this view is thought to be supported by the generally accepted theory that if there is an insurable interest when the policy is taken out, its continuance is not necessary. See *Mutual Life Insurance Co. v. Allen*, 138 Mass. 24. Even these jurisdictions, however, would probably declare invalid an assignment of a policy to one without interest made so soon after the issuance of the policy as to evidence an intent to circumvent the requirement as to insurable interest on the part of the assured. *Steinback v. Diepenbrock*, 158 N. Y. 24. Logically, it would seem that the grounds of public policy requiring an insurable interest to support a life policy, are equally present whenever the policy is assigned. *Warnock v. Davis*, 104 U. S. 775. It is on this ground that a few courts hold an assignment to one without insurable interest absolutely void, or, as in the principal case, allow the assignee to recover no more than actual reimbursement. *Missouri Valley Life Insurance Co. v. Sturges*, 18 Kan. 93; *Culver v. Guyer*, 129 Ala. 602.

INSURANCE — NATURE AND INCIDENTS OF INSURANCE CONTRACTS — ASSIGNABILITY OF CASH SURRENDER VALUE. — A life-insurance policy was payable to the wife of the insured, but contained a provision that at the end of certain specified periods the insured might surrender it and receive its cash value. Shortly before the end of such a period the insured assigned the policy. The assignee demanded the cash value at the proper time, but at the instance of the insured the company refused to pay it. *Held*, that the power to collect the cash value is not assignable. *Moser v. Connecticut Mutual Life Insurance Co.*, 119 S. W. 792 (Ky.).

Where the wife of the insured is named as beneficiary, her interest in the policy cannot be defeated by its voluntary assignment to the insured's assignee in bankruptcy. See *Central Bank of Washington v. Hume*, 128 U. S. 195, 206. In Kentucky this exemption from a bankrupt's assets has been extended to a cash surrender value payable to the insured himself at his own option. *Townsend v. Townsend*, 127 Ky. 230. The main case applies the same principle to an assignment for consideration. The theory of the Kentucky court is that the right to surrender the policy for cash is a power which must be exercised by the insured in person. It is well settled that a power affecting another's interest, and involving confidence and discretion, cannot be delegated. *Ingram v. Ingram*, 2 Atk. 88. But where the only need for discretion is in deciding whether the power shall be executed, the appointment of another to carry it out has been sustained as amounting to an informal execution of the power. *Sergison v. Sealy*, 9 Mod. 390; *Crooke v. County of Kings*, 97 N. Y. 421. In the main case, the sole discretionary power of the insured appears to have been in deciding whether the policy should be surrendered, and the assignment was practically an exercise of that power. Accordingly it would seem that the assignee should have received the cash value.

INTERSTATE COMMERCE — CONTROL BY STATES — REQUIREMENT TO FILE CERTIFICATES. — Suit was brought in Kansas upon a note given to an Illinois corporation, for goods shipped from Illinois into Kansas pursuant to an order taken by a drummer in the latter state. A Kansas statute forbade any foreign corporation doing business in the state, from maintaining an action without having obtained a certificate that certain statements had been filed. *Held*, that the statute is not unconstitutional. *Wilson-Moline Buggy Co. v. Hawkins*, 101 Pac. 1009 (Kan.).

Any attempt by a state legislature to interfere with the sale of articles within the state by a foreign corporation, is unconstitutional as an interference with interstate commerce. *Robbins v. Shelby County Taxing District*, 120 U. S. 489. The question of such interference frequently arises under the common statutory requirement that a corporation, "doing business" within the state, must have an authorized agent therein, and must file certain certificates. Such a transaction as that in the principal case is usually held not to be "doing business" under the statute. *Cooper Mfg Co. v. Ferguson*, 113 U. S. 727. But if the statute does apply to such a transaction, it has been held unconstitutional. *Murphy Varnish*



*Co. v. Cornell*, 10 N. Y. Misc. 553. See *Mearshon v. Lumber Co.*, 187 Pa. St. 12. *Contra, Western Paper Bag Co. v. Johnson*, 38 S. W. 364 (Tex. Civ. App.). The attempted distinction in the principal case that the requirement was merely a condition precedent to maintaining an action in the state courts, and not a regulation of interstate commerce, seems unsound. *Bateman v. Western Star Milling Co.*, 1 Tex. Civ. App. 90; *Murphy Varnish Co. v. Cornell*, *supra*. For to prevent an action for the purchase price in a sale of this character, merely because the foreign corporation has not fulfilled the statutory requirement, is surely a potent hindrance on interstate commerce.

JUDGMENT — COLLATERAL ATTACK — ATTACK BY SUIT TO QUIET TITLE. — By a divorce decree, title to land was declared to be in the husband. The wife brought suit to have title to the land quieted in her as against the husband and a *bona fide* purchaser from him, alleging that the decree was based on a stipulation obtained by fraud and duress, and was subsequently altered. *Held*, that the suit is a direct attack on the decree. *Kwentsky v. Sirovy*, 121 N. W. 27 (Ia.).

An attack on a judgment is collateral, in contradistinction to direct, unless the proceeding is expressly adapted and instituted to annul or modify the decree. *Morrill v. Morrill*, 20 Or. 96. If the proceeding has an independent purpose the attack is collateral, although the modification of the judgment is a prerequisite to the end sought. *Lovitt v. Russell*, 138 Mo. 474. *Cf. Homer v. Fish*, 1 Pick. (Mass.) 435. Maintaining that under liberal code procedure, the courts should give the parties every relief to which the stated facts entitle them, regardless of the form in which the facts may be presented, some jurisdictions have held that a suit brought expressly to set aside a decree fraudulently obtained is not a collateral attack thereon, even though asking for further relief in the matter of title. *Noble v. Aune*, 50 Wash. 73. And in a proceeding to revive a judgment, the defendant's answer attacking it has been held to be direct. *Waterman v. Bash*, 46 Wash. 212. *Contra, Friedman v. Shamblin*, 117 Ala. 454. The principal case is not an extreme application of a doctrine which considers as direct any attack raised by the pleadings, thus accomplishing liberality in procedure at the expense of stability of judgments.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — ACTION BY LANDLORD DURING TERM. — After breach of the tenant's covenant to repair the landlord made the repairs, and during the term sued for the cost thereof. *Held*, that since the landlord has failed to show damage to the reversion, he cannot recover. *Wechsler v. Gude Co.*, 117 N. Y. Supp. 1037 (Sup. Ct.).

In England in such cases, the measure of damages is usually the diminution in the value of the reversion. *Doe v. Rowlands*, 9 C. & P. 734. But where this test is not practicable, the landlord has been awarded the cost of repairing. *Davies v. Underwood*, 2 H. & N. 570. In this country, this latter criterion has always been applied. *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400; *Buck v. Pike*, 27 Vt. 529. In the principal case the court gives no reason for departing from the authorities, basing its decision entirely on a *dictum* in a recent case. See *Appleton v. Marx*, 191 N. Y. 81. The theory adopted is that the only damages recoverable during the term are for injuries to the reversion; while in an action brought after expiration of the lease, the measure of damages is the cost of repairing. This doctrine places the landlord in a dilemma when the tenant breaks his covenant to repair. Either he must permit the premises to deteriorate in order to show damage to the reversion; or if he repairs, he must wait for reimbursement till the lease expires. The decision seems indefensible, both on principle and on authority.

LEGACIES AND DEVISES — PARTICULAR INSTANCES OF CONSTRUCTION — IMPOSSIBILITY OF PERFORMANCE OF CONDITION SUBSEQUENT. — A testatrix bequeathed money to a church, to be used in building a Sunday school on a stipulated site. In condemnation proceedings by the county to get the proposed site,

the legatee claimed as compensation, the amount of the legacy in addition to the market value of the land on the ground that failure to use the named site would forfeit the legacy. *Held*, that the legacy would not be forfeited. *New Haven County v. Parish of Trinity Church*, 73 Atl. 789 (Conn.).

The effect of non-performance of a condition subsequent is ordinarily to divest the legacy. *Wheeler v. Lester*, 1 Bradf. (N. Y.) 213. However, there will be no forfeiture when performance by the legatee is, or later becomes impossible; as, for example, where he is prevented from performing by act of God. *Parker v. Parker*, 123 Mass. 584. The same is true when performance is impossible because illegal. *Cheairs v. Smith*, 37 Miss. 646. Impossibility because of foreign law is also an excuse. *Young v. Vass' Ex'r*, 1 Patt. & H. (Va.) 167. In all these cases, the law seeks to give effect to the testator's intentions; so if his primary object can still be accomplished, the legacy should not be divested, merely because it cannot be applied exactly as prescribed. *Young v. Vass' Ex'r*, *supra*. But if the illegal condition is the sole motive of the bequest, the legatee being merely a trustee not intended to take a beneficial interest, the gift will be forfeited. *Lusk v. Lewis*, 32 Miss. 297. Since the location of the Sunday school on the particular site was not the primary motive of the testatrix, the principal case seems rightly decided.

**LIFE ESTATE — PERSONALTY TO FOLLOW LIMITATIONS OF REALTY.** — Certain chattels were given to be "used, held and enjoyed" by the person for the time being entitled to a certain mansion-house; but title to them was not to vest in a tenant-in-tail until majority, although such tenant was to have the "use and benefit" of them until that time. A tenant-in-tail attained majority, but died before coming into possession of the realty. *Held*, that since there is a plain intention on the part of the settlor, that the chattels should vest in a tenant-in-tail in possession, the personal representative of the deceased is not entitled to them. *In re Lord Chesham's Settlement*, 25 T. L. R. 657 (Eng., Ct. App., June 15, 1909).

This decision reverses that of the Chancery Division discussed in 22 HARV. L. REV. 441.

**MORTGAGES — PRIORITIES — MORTGAGE FOR FUTURE ADVANCES.** — A executed a mortgage to B in the form of a bill of sale of a certain dredge, to secure the repayment of money already advanced and such advances as might thereafter be made. This mortgage was duly recorded. A later gave a second mortgage to C, which was likewise recorded. In ignorance of the mortgage to C, B made further advances to A. C knew the amount of the original advance by B, and probably knew the state of the accounts between A and B when he took his second mortgage. *Held*, that B's lien is prior to that of C both as to the original and as to the subsequent advances. *The Seattle*, 170 Fed. 284 (C. C. A., Ninth Circ.).

A mortgage to secure present and future advances gives a prior lien for advances made in ignorance of, but subsequent to, an intervening incumbrance. *Ackerman v. Hunsicker*, 85 N. Y. 43. The mortgagee is in the position of a trustee or other obligor who has dealt with his obligee in ignorance of an assignment or incumbrance of the latter's interest. *Cf. Newman v. Newman*, 28 Ch. D. 674. By the great weight of authority, the recording of the second mortgage is not a notice to the first mortgagee, unless he takes a new conveyance. This is true even where the statute makes the record notice "to all persons"; for this is taken to mean only those acquiring a new interest, whereas the mortgagee relies on what he already has. *Birnie v. Main*, 29 Ark. 591. *Contra, Ladue v. Detroit & Milwaukee R. R.*, 13 Mich. 380. The court questions *obiter* whether a mere statement that the mortgage is "for advances to be made" is not too vague. A second mortgagee, however, who advanced his money without inquiry as to their amount could hardly be a *bona fide* purchaser; and he could protect himself as to subsequent advances by giving notice of his incumbrance to the first mortgagee. *Wilczinski v. Everman*, 51 Miss. 841. *Contra, Balch v. Chaffee*, 73 Conn. 318.



**POWERS — EXTINGUISHMENT OF POWER APPENDANT BY CONVEYANCE IN FEE BEFORE APPOINTMENT.** — The testator devised property to trustees for the use of his mother for life, and at her death to be paid over to such charitable institution as his widow should elect; but in default of such election the income to be paid to his widow for life, and at her death the property to be divided between two specified associations. The mother, the widow, the testamentary trustees, and the trustees of the specified associations joined in a conveyance to the appellee. *Held*, that the power appendant is extinguished by the conveyance. *Columbia Trust Co. v. Christopher*, 117 S. W. 943 (Ky.).

For a discussion of the principles involved, see 22 HARV. L. REV. 444.

**PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — EXCLUSIVE TELEPHONE CONTRACT.** — Suit was brought on a contract whereby the defendant telephone company agreed to give exclusive connection to the plaintiff telephone company. *Held*, that such a contract will not be enforced by the courts. *United States Telephone Co. v. Central Union Telephone Co. et al.*, 171 Fed. 130 (C. C. N. D. Ohio). See NOTES, p. 54.

**PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — TERMINATION OF TELEPHONE CONNECTION.** — The plaintiff and defendant telephone systems were physically connected under a verbal agreement that each should render service to the patrons of the other. No provision for termination was made. *Held*, that the agreement fixed a status terminable only by the retirement of one or the other of the parties from the telephone business. *State ex rel. Goodwin v. Cadwallader*, 87 N. E. 644 (Sup. Ct., Ind.). See NOTES, p. 54.

**RESTRAINT OF TRADE — COMBINATION BY AGREEMENTS AS TO PRODUCT OR PRICES — INJUNCTION AGAINST UNLAWFUL COMBINATION.** — Certain insurance companies entered into an agreement, by which the management was to be in a central body, which should establish uniform rates. The Attorney General, on behalf of the public, sought to enjoin them from acting under the agreement. *Held*, that he is entitled to the injunction. *McCarter v. Firemen's Ins. Co.*, 73 Atl. 80 (N. J., Ct. Err. & App.).

Contracts tending to suppress competition are unlawful only in the sense that they are unenforceable. *Richardson v. Buhl*, 77 Mich. 632. The law gives no affirmative relief against them. *McGregor v. Mogul Steamship Co.*, [1892] A. C. 25. A different rule applies to combinations of public service companies, whose *ultra vires* acts likely to injure the public can be enjoined by the state. *Attorney General v. Great Northern Ry.*, 1 Dr. & Sm. 154. So too a statute fixing prices charged by a corporation engaged in a business affected with a public interest has been held to be constitutional. *Munn v. Illinois*, 94 U. S. 113. It might be argued that insurance is such a business, but there is no authority for so treating insurance as a public service. In spite of the court's ingenious and plausible opinion, the principal case marks an extension of equity jurisdiction as yet unsupported by authority. See *Queen Ins. Co. v. State*, 86 Tex. 250. The result, although desirable, might more properly be reached by statute than by judicial decision. See 19 HARV. L. REV. 301.

**RULE IN SHELLEY'S CASE — APPLICATION TO PERSONALTY.** — The residue of an estate consisting of realty and personalty was left upon trust to pay the income "in equal shares to A and B during their lives, and upon the death of either her share to go to her heirs" until one half of the principal had been made over to them. *Held*, that though by the Rule in Shelley's Case A and B take an equitable estate in fee in the realty, that rule is inapplicable to the personalty. *Lord v. Comstock*, 88 N. E. 1012 (Ill.). See NOTES, p. 51.

**SALES — TIME OF PASSING OF TITLE — CASH SALES: WAIVER OF THE CONDITION BY DELIVERY.** — The plaintiff, who lived some distance from town, sold

and delivered wheat after banking hours, receiving a check which was dishonored when he presented it on his next visit to town about two weeks later. Meanwhile the buyer became insolvent and the defendant attached the wheat. The check would have been paid if presented before the insolvency, although the buyer had no deposit. In an action for conversion the plaintiff had a verdict and judgment. *Held*, that the judgment is not against the evidence. *People's State Bank of Michigan Valley v. Brown*, 103 Pac. 102 (Kan.).

It is well settled that delivery of the goods by the seller under an agreement for a cash sale may constitute a waiver of the condition of payment and pass title to the buyer. *Globe Milling Co. v. Minnesota Elevator Co.*, 44 Minn. 153. The generally accepted rule is that such a waiver depends upon the intention of the seller as determined by the jury. *Goslen v. Campbell*, 88 Me. 450. Some courts treat unrestricted delivery as *prima facie* evidence of an intention to waive cash payment. *Smith v. Lynes*, 5 N. Y. 41. Others have held that such a delivery should be conclusive evidence of a waiver. *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446. See WILLISTON, SALES, § 346. Logically this rule is correct, for delivery without payment is obviously inconsistent with a cash sale. Applying this rule to the facts of the principal case there was either an absolute delivery on credit or a conditional sale. If the former, an action for conversion would not lie. If a conditional sale, it would be void against creditors of the buyer because unrecorded. GEN. STAT. KAN. (1897), c. 120, § 13. Even under the generally accepted rule the decision seems an extreme one, for the authorities require that the seller shall assert his right to the goods within a "reasonable time." *Smith v. Dennie*, 23 Mass. 262.

**SPECIFIC PERFORMANCE — LEGAL CONSEQUENCES OF RIGHT OF SPECIFIC PERFORMANCE — RIGHT OF PERSONAL REPRESENTATIVE TO PURCHASE MONEY IN OPTION TO PURCHASE.** — A leased land to B, giving him an option to purchase at any time within five years on notifying A or "his legal representative," and tendering to A or "his legal representative" the agreed price. A died intestate. B tendered the price to the administrator of A. *Held*, that this is a proper tender, the heirs of A having no rights in the money. *Rockland-Rockport Lime Co. v. Leary*, 117 N. Y. Supp. 405 (Sup. Ct., App. Div.).

The administrator's right to the purchase price on a contract made by the intestate flows from the descent to the personal representative of the vendor's right of action for the price. *Moore v. Burrows*, 34 Barb. (N. Y.) 173. In the case of an unexercised option, since there is no obligation, no right should descend to the personal representative. The case of a mortgage conveying title without a mortgage debt is analogous. The executor has no claim on what is paid to redeem, as the decedent had no cause of action against the mortgagor. *Turner v. Crane*, 1 Vern. 170. See *Smith v. Smoult*, 1 Ch. Cas. 88; *Thornborough v. Baker*, 3 Swanst. 628. The result should be the same where land descends subject to an option to purchase. *Smith v. Lowenstein*, 50 Oh. St. 346; *Re Walker's Estate*, 17 Jur. 706. The principal case, however, represents the prevailing rule both in England and in this country. *In re Isaacs*, [1894] 3 Ch. 506; *Newport Water Works v. Sisson*, 18 R. I. 411. The doctrine that the acceptance of an option relates back so as to convert the realty into personalty from the time of giving the option has been confined in England to a dispute between claimants under the vendor, so that where he option is exercised after a destruction of the premises by fire, the vendee is not entitled to the insurance. *Edwards v. West*, 7 Ch. D. 858. *Contra*, *Williams v. Lilley*, 67 Conn. 50; *People's St. R'y Co. v. Spencer*, 156 Pa. St. 85.

**TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — WHO MAY EXECUTE TRUST AFTER DEATH OF TRUSTEE.** — Money was left to an administrator to pay the income to the testator's sister for life, and authorizing him to use any part of the principal for her support, if in his judgment it should be necessary. A subse-



quent trustee, appointed by the court under statutory authority, sought to exercise the power of using part of the principal. *Held*, that he cannot do so. *Whitaker v. McDowell*, 72 Atl. 938 (Conn.). See NOTES, p. 59.

**WAGERING CONTRACTS — RECOVERY OF MONEY LENT FOR GAMBLING.** — The plaintiff lent money to the defendant's testator knowing that it might be used in gambling. The money was lent and so used in a jurisdiction where gambling was not illegal. *Held*, that the plaintiff can recover. *Saxby v. Fulton*, 25 T. L. R. 446 (Eng., Ct. App., Mch. 25, 1909).

This decision affirms that of the King's Bench Division discussed in 22 HARV. L. REV. 65.

**WILLS — SPECIFIC BEQUESTS — EXPENSE OF MAINTENANCE BEFORE DISTRIBUTION.** — The testator bequeathed certain specific legacies. Expense was incurred in their care and maintenance pending the settlement of the estate. *Held*, that the specific legatee, and not the residuary estate, must pay the expenses of the up keep. *In re Pearce*, [1909] 1 Ch. D. 819.

A specific legacy is considered as separated from the general estate and appropriated from the date of the testator's death. See *Isenhardt v. Brown*, 2 Edw. Ch. (N. Y.) 341, 347. Upon the assent of the executor, the rights of the specific legatee date back to that time. See *Saunders' Case*, 5 Coke, 12 b. He is accordingly entitled to all accretions or profits added in the interim; for example, the dividends on stock, or the young of animals. See *Isenhardt v. Brown*, *supra*. On the other hand, any deficiency in the specific legacy must be borne by him, and will not be made up from the residuary estate. *Sleech v. Thonington*, 2 Ves. 563. Owing to an utter dearth of direct authority on the issue before the court in the principal case, the matter of expense was held to be the converse of profits arising *ad interim*, and the question was decided entirely on principle. The result seems eminently sound, for since the specific legatee gets all benefits accruing within this period, he should bear the burdens as well.

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## BOOK REVIEWS.

**THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT.** By Samuel Williston. New York: Baker, Voorhis and Company. 1909. pp. cix, 1314.

This is a thorough and admirable piece of work. To its production the author brought an unusual equipment. He had taught the subject of Sales of Goods for many years in Harvard Law School; he had published a scholarly collection of cases on this topic, and he had drafted and redrafted, explained and championed the statute now known as the Uniform Sales Act. No member of the American Bar possesses qualifications for authorship in this branch of the law superior to those of Professor Williston. It is safe to predict that no better treatise on Sales of Goods, than the one before us, will be offered to the public soon.

As indicated by the title, this book is not a mere commentary on the Uniform Sales Act. Indeed, such commentary forms but a small part of the work. The larger and more valuable part is devoted to a statement of the common law rules governing the subject. It is here that the author displays his powers of exposition at their best, and justifies the high regard in which he is held, as a teacher, by the growing multitude of lawyers who have had the good fortune to be his pupils. Possibly, busy and experienced practitioners may chafe at times, under the curb put upon their impetuous search for the existing rule of law upon a given point, by the author's careful and painstaking review of conflicting decisions; but it is probably safe to assert that even they will be benefited by his elucidation of the

principles which should control such decisions. Undoubtedly, some students of this branch of law will not agree with him in all his views and conclusions. No one, however, will question the fairness or the ability which characterizes his discussion throughout the volume.

The extent to which the Uniform Sales Act has modified the rules of the common law is carefully pointed out by the author. Some of these modifications are copied from the English Sale of Goods Act. For example, section five of each statute abrogates the doctrine of "potential possession" set forth in *Grantham v. Hawley* (Hob. 132). In England, this section was thought by the draftsman to be a mere codification of existing law. (See Chalmers, *Sale of Goods Act*, 5th ed., p. 19.) But in this country, it was intended to abolish the doctrine referred to, as one which was unsound in principle and pernicious in practice. It is submitted the arguments for such abolition, contained in §§ 133 to 146 of our text, are unanswerable.

But the American statute does not follow the English model throughout. In section four the redraft of the famous seventeenth section of the Statute of Frauds differs in several respects from the same section of the English Act. It rejects the rule laid down in *Lee v. Griffin* (1 B. & S. 272), although the draftsman declares that such "rule is absolutely logical and is the only rule that has ever been suggested for which so much can be said"; and adopts in its stead, "the Massachusetts rule, which was first laid down by Chief Justice Shaw, in *Mixer v. Howorth* (21 Pick. 205)." The sections relating to "conditions and warranties" differ widely from the corresponding sections of the English statute, and, if adopted, will work a radical change in the law of many of our states. Whether it was good policy to substitute for the provisions of the English Code on this topic rules which have secured recognition in but a small minority of our jurisdictions remains to be seen. The fact that this Act was not passed in any state, during the current year, may indicate that it was not good policy.

Another departure from the English statute is found in those sections which deal with "negotiable documents of title" — sections twenty-seven to forty inclusive. These were not contained in the original draft, but were added upon the request of the Commissioners on Uniform State Laws. While they do not treat documents of title as possessing the full negotiability of a bill or note, they do propose a great change, not only in the common law rule upon this topic, but in that laid down by the American Factors Acts. A very strong argument for the change thus proposed, as well as for the limits set to this change, will be found in the twelfth chapter of the text.

In commenting on the varying phraseology of the Statute of Frauds in our states, the author says (p. 82): "How far the use of the word 'void' in the statute should be held to require a difference in construction is a question upon which authority is lacking." Has he not overlooked such decisions as those in *Marie v. Garrison* (13 Abb. N. C. 210, 257-9); *Chamberlain v. Dow* (10 Mich. 319); *Grimes v. Van Vechten* (20 Mich. 410); *Scott v. Bush* (26 Mich. 418), and *Waite v. McKelvey* (71 Minn. 167)?

Although a few errors in proof reading have been noted (on pp. 21, 200, 746), the book appears to be unusually free from such defects, and is one which can be commended to the profession without reservations of any kind.

F. M. B.

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A TREATISE ON THE LAW OF TRUSTEES IN BANKRUPTCY, WITH THE NATIONAL BANKRUPTCY ACT OF 1898 AS AMENDED, THE GENERAL ORDERS AND THE OFFICIAL FORMS. By Albert S. Woodman. Boston: Little, Brown and Company. 1909. pp. xci, 1103. 8vo.

This book has the merit of segregating a portion of the law of bankruptcy, and of dealing with that portion from a single point of view in a way that has not pre-



viously been done. The author puts himself in the position of a trustee in bankruptcy and considers the proper course for such an official to pursue in the various contingencies that may arise. The author has had large practical experience in bankruptcy matters, and his treatise cannot fail to be valuable to trustees and their legal advisers. Especially on matters of practice, where it is not always easy to find statements in the decisions pointing out the proper course of procedure, his advice is helpful. As he says in his preface his aim is to furnish a safe guide for trustees, even though this may mean sometimes taking precautions not always deemed necessary; and his book in considerable measure carries out the design the author has expressed.

In some respects, however, the book is open to a criticism, to which it may be added most if not all other American treatises on bankruptcy are also open. American writers on bankruptcy act on the assumption that a satisfactory treatise on the subject can be produced, which shall be based exclusively on the decisions of courts of bankruptcy, and moreover almost wholly on American decisions under the present statute. In fact the law of bankruptcy involves as part of itself a large amount of substantive law which also finds a place under other topics, and requires for its satisfactory treatment a knowledge of these other topics. An illustration of what is meant may be taken from the book under review. The subject of what property passes to the trustee is properly included as an important chapter, and in this chapter the right of a defrauded seller to reclaim from the trustee property fraudulently acquired by the bankrupt is stated and what amounts to fraud is discussed. Such questions constantly arise in bankruptcy, and reference to them cannot be omitted from a treatise on bankruptcy; but the law of fraud has not been wholly or even chiefly settled in bankruptcy courts, and an attempt to discuss it exclusively on the basis of the decisions of Federal courts in bankruptcy matters is certain to be unsatisfactory. Thus not only is the entire discussion of the matter meagre and without reference to most of the authorities which should be cited, but the author is led on page 143 to suppose that a rule peculiar to Pennsylvania has a wider scope; and on page 146 he states that "If the bankrupt honestly, and upon reasonable grounds, believed his representations to be true, the vendor will not be permitted to rescind the sale, even though the representations were true." No authorities whatever are cited for this statement, though there are many decisions on the right to rescind an executed transaction for innocent misrepresentation, and modern authority is opposed to the author's conclusion. Other illustrations might be given of unsatisfactory discussions of matters the proper decision of which demands consideration of principles not to be found in bankruptcy statutes, orders or practice. But where the author is not compelled to go beyond these limits his book is always helpful. s. w.

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FEDERAL EQUITY PRACTICE. By Thomas Atkins Street. In three volumes. Edward Thompson Company. 1909. pp. xc, 613; 614-1313; 1314-2104.

This is much more than a mere hand-book for the practitioner; it is a serious and successful treatise upon the subject, designed to state accurately and comprehensively the present state of equity procedure, and to show the changes, already made, and in process of making, at the hands of the federal bench. In form it is not unlike the usual treatises of kindred sort. The text is followed by the Supreme Court Equity Rules, the Ordinances of Lord Bacon, and the English Orders in Equity, promulgated in 1841 (an excellent addendum). There follows a set of forms copied either from actual litigations or from standard manuals, a table of cases and a voluminous index.

The text is as usual divided into sections with copious citations, and with statements of the more important cases incorporated into the body of the text in smaller type with such occasional excerpts from the opinion as are especially tell-

ing. This novel feature of the work is done with much skill and avoids the inaccurate and often misleading habit of merely copying extracts from opinions without giving the reader such a synopsis of the facts as alone gives significance to the words of the judge.

The work is not merely an effort to modernize old treatises, but states *de novo* the present science to which it is devoted. The author does not hesitate to advance his own views, which are usually well considered, and to point out inconsistencies in the decisions. Yet he does not forget that his book is to be a guide to actual practice and that it must enable the reader to conform his proceedings to the existing rules which the courts will in fact enforce. It would be a hard thing to accomplish better than he has done it, the proper combination between accuracy and the spirit of criticism and freedom without which this branch of law must fall into a slavish and unintelligent formalism. The book should serve as a help to judges in new cases, as well as a guide to the bar.

The subject is a peculiarly difficult one to treat satisfactorily, first because it was at the outset a not very consistent adaptation from canonical procedure, and second because it is no longer in this country a living art, as it was practiced in England, and to some extent here, for the first four decades of the nineteenth century. No one need have great experience in the federal courts to realize that as a familiar system of procedure with which the practitioner has become early acquainted, it has ceased to exist. The judges themselves are not accustomed to its use, and are apt to regard the rules as archaic lore full of metaphysical distinctions and pitfalls. The tendency is strong to treat the whole matter as one for the application of common-sense, and that tendency has repeatedly had the most useful results.

It would perhaps not be grossly inaccurate to say that the whole development of equity pleading turned upon the discovery included in the answer and upon the secret taking of testimony by deposition. Mr. Street has very properly first treated the subject as though a discovery were the object of the suit, though, as he at once observes, that has practically ceased to be the case almost universally. Even at its height, equity pleading wholly failed intelligently to master the problem of a discovery and incidentally fell into an irksome habit of verbosity and inaccurate definition of the issues, of which we are now unhappily the heritors after the avowed excuse for it has gone.

Similarly in the taking of evidence, we preserve the immense disadvantage in administering justice which comes from depriving the tribunal of first instance of any chance to see and hear the witnesses, while we have lost the actual restraint upon perjury which existed when the testimony was taken in secret. We seem to have lost the use of such good things as the system was designed to promote, while we have been unable to shake off the cumbersome methods by which they were thought to be secured.

All this must make such a work an ungrateful task, and it makes the more creditable its adequate performance as here. To help a bench and bar, confessedly informed, or uninformed, to an understanding of the real significance of an outworn system, to show that a laborious consistency actually does in some measure obtain, and that perhaps through impatience more and more liberality does creep in, and, as it comes, frees the administration of justice; this is an excellent service until some one can devise a pliant and practical system based upon the theory that after all the only purpose of procedure is to expedite the determination of actual disputes.

It is a strange thing that in this country we should, even with an early start at reforms in legal procedure, still remain tangled in our methods of getting at the real issues. Indeed, the federal courts use this archaic system in practice much more satisfactorily than many of the state courts use their reformed procedure. The truth is that we shall not succeed in emerging, until we realize that the whole matter should be an attitude of mind on the part of the judge, rather than a set of rules. The whole of practice has for its justification only to prevent one party



from surprising the other, and to avoid unnecessary consumption of time, and the judge can do both, if he is fit for his place, and not too much circumscribed by rules which he must observe. In some way our bar has identified the preservation of such rules with the liberty and rights of the citizens, and while it on occasion can indulge in rhetorical praise of the bench as the keystone of our constitution, in practice it too often regards with extreme jealousy and as a usurpation any latitude which the bench may allow itself in disregarding rules of procedure.

The gradual melioration which the federal bench has from time to time effected by using the rules of practice, rather as a guide to proper procedure, than as an absolute condition of any approach to the court, Mr. Street shows very clearly. To those who use the book intelligently, and above all to judges who can apprehend that the whole matter finally lies in their hands, he should be a comfort and a refuge. He shows himself to be a sane observer, willing patiently to comprehend the meaning of the system he has undertaken to set forth, and intelligent enough to observe that it is, even as it stands, a living instrument in the hands of men, usually somewhat unfamiliar with its historic significance, but determined to make it the means for the actual despatch of the business at hand. L. H.

ELEMENTS OF THE LAW OF DAMAGES: A Handbook for the Use of Students and Practitioners. By Arthur George Sedgwick. Second Edition, Revised and Enlarged. Boston: Little, Brown and Company. 1909. pp. xxxv, 368.

The text and the number of citations of this work, which accompanies a second edition of Professor J. H. Beale's *Cases on Damages*, are considerably enlarged after an interval of thirteen years. "The chief additions relate to Mental Suffering, . . . Death by Wrongful Act, Compensation and Benefits under Eminent Domain Statutes, Interference with Contract and the right to seek Employment, Liquidated Damages, Limitations of Liability," Damages in certain classes of contracts, Conflict of Laws, and Pleading and Practice. Entire new chapters on Eminent Domain, Conflict of Laws, and Pleading and Practice appear in this edition.

Mr. Sedgwick prefers the views of the Rhode Island and later English cases (*Simone v. The Rhode Island Co.*, 28 R. I. 186, and *Dulieu v. White* (1901), 2 K. B. 669), that recovery can be had for physical injury resulting from fright caused by negligence to the New York and Massachusetts decisions (*Mitchell v. Rochester*, 151 N. Y. 107, and *Spade v. Lynn & Boston R. R. Co.*, 168 Mass. 285), which leave such a plaintiff remediless. Thus he finds the theory of proximate cause in actions for physical injury produced by negligence at length properly dealt with. He has made no change in his views as to exemplary damages. See 9 HARV. L. REV. 491. The growing importance of the subject of Conflict of Laws justifies the short chapter thereon. Here the author indicates that the law of the place of the performance of the contract should govern the measure of damages and the interest on the amount thereof. The peculiar Massachusetts rule that the rate of interest is determined as a matter of remedy by the *lex fori* (*Barringer v. King*, 5 Gray 9) he characterizes very properly as "local and technical." The many positive virtues noted in the first edition have, speaking generally, been perpetuated and enlarged in the new. J. W.

A TREATISE ON THE FEDERAL EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS. By W. W. Thornton. Cincinnati: The W. H. Anderson Company. 1909. pp. xlvii, 410. 8vo.

Mr. Thornton's book consists of two distinct parts — one of one hundred and thirty-nine pages on the Employers' Liability Act of 1908, and one of ninety-

eight pages on the Safety Appliance Act of 1893 as amended by the Acts of 1896 and 1903. The jurisdictional and constitutional questions arising under the two Acts are almost identical, so that the value of the careful discussion of these points is greatly increased by their parallel treatment. The author has not attempted to collect all the cases involving interstate commerce. He has simply arranged in a clear way the decisions defining specifically the limits of federal power in relation to the special railway regulations under discussion. On non-jurisdictional points the two Acts are distinct. The decisions on the Employers' Liability Act are as yet very few, and since it introduces a new rule of comparative negligence as a measure of damages common-law cases are of little value. For that reason, until decisions under the Act appear, the author's collection of cases from Georgia and Illinois, where a similar rule prevails, will be very helpful. Furthermore, his quotations from the Congressional Record showing the intended purpose of the Act are appropriate and cannot otherwise readily be found. The case of the Safety Appliance Act is different. There the decisions, especially in the circuit courts, are fairly numerous but unfortunately not in accord. The author has collected the conflicting authorities, but perhaps for the sake of brevity has sometimes omitted to give his own reasons for preferring either view. Possibly in discussing the question of whether or not a carrier operating entirely in one state is subject to the Act (see §§ 132-134), these reasons would be superfluous, but on the question of the degree of care required in discovering defects and making repairs (see §§ 155 and 156) the author's personal analysis of the situation would be interesting. The arrangement of the discussion throughout is very clear, so that any point can easily be found without the index. The appendix contains the text of various acts and copies of pertinent opinions unreported before March 23, 1909.

P. K.

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QUESTIONS AND ANSWERS FOR BAR-EXAMINATION REVIEW. By Charles S. Haight and Arthur M. Marsh. Second Edition. New York: Baker, Voorhis and Company. 1909. pp. lii, 585. 8vo.

While the questions and answers in this book are framed primarily with a view to recalling important points to those who have already acquired a fairly thorough knowledge of the fundamental theories involved, it would be a mistake to assume that they do not contain much illuminating discussion of questions on which the authorities are not settled. The discussions, to be sure, are not lengthy: lengthy discussions would impair the value of the book to those reviewing for bar examinations. But the brief summaries of how the authorities stand, with the citations and discussions of each line of authority, are so clear that they may be consulted with profit by the student or practitioner, as well as by the "crammer." This will be seen by a glance at the section on unauthorized acts of private corporations, p. 135, or the section on contracts for the benefit of third persons, pp. 103, 104. These selections are chosen at random, and there are many others of equal value. A well-arranged index and an accurate table of cases increase the usefulness of the book for purposes of reference.

A book of this nature almost necessarily contains statements which though literally accurate would be apt to mislead those not familiar with the propositions of law underlying the answers. For example the statement on p. 193 that a marriage legally contracted is valid anywhere if valid by the *lex loci contractus* even if invalid by the law of the domicile might easily cause confusion in regard to the control over a person's status exercised by the law of his domicile. Such instances, however, are not to be considered as defects in the work. They merely go to show that the book cannot be used safely by those who depend on it as their only source of information: a use by no means designed by the authors.

The section on the New York Code deserves special mention. The essential points of the code are dealt with. The exact language of the code is used in the



answers except where further explanation is necessary to clearness. The treatment of the subject is so skilful that it will be a great help to those who prepare for their bar examinations without the advantage of the practical training of a clerkship.

A. C. B.

REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. Baltimore: The Lord Baltimore Press. 1908. pp. 1120.

A TREATISE ON THE LAW OF INSURANCE. By George Richards. Third Edition, Enlarged and Rewritten. New York: The Banks Law Publishing Company. 1909. pp. xxvii, 959.

A TREATISE ON THE LAW OF LANDLORD AND TENANT. By H. C. Underhill. In two volumes. Chicago: T. H. Flood and Company. 1909. pp. ccxxiv, 670; 671-1516.

THE LAW OF UNFAIR BUSINESS COMPETITION. By Harry D. Nims. New York: Baker, Voorhis and Company. 1909. pp. xlv, 581. 8vo.

HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS. By Walter C. Tiffany. Hornbook Series. Second Edition by Roger C. Cooley. St. Paul: West Publishing Company. 1909. pp. xiii, 656.

THE INDIAN CONTRACT ACT. With a Commentary, Critical and Explanatory. By Sir Frederick Pollock, Bart., assisted by Dinebah Fardunji Mulla. Second Edition. London: Sweet and Maxwell, Limited. 1909. pp. cvii, 744.

A TREATISE ON DAMAGES. By John D. Mayne. Eighth Edition. By Lumley Smith. London: Stevens and Haynes. 1909. pp. c, 766.

THE LAW OF PERSONAL INJURIES ON RAILROADS. By Edward J. White. In two volumes. St. Louis: The F. H. Thomas Law Book Company. 1909. pp. ccxiii, 826; xxxviii, 827-1739.

THE POWER OF EMINENT DOMAIN. By Philip Nichols. Boston: Boston Book Company. 1909. pp. xxi, 560.

THE HAGUE PEACE CONFERENCES OF 1899 AND 1907. By James Brown Scott. In two volumes. Baltimore: The Johns Hopkins Press. 1909. pp. xiv, 887; vii, 548.

THE LAW OF EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION. Fourth Edition. By Thomas Beven. London: Stevens and Haynes. 1909. pp. lxxxiii, 953.

THE LAW AND CUSTOM OF THE CONSTITUTION. By Sir William R. Anson. In three volumes. Volume I: PARLIAMENT. Fourth Edition. Oxford: At the Clarendon Press. London, New York and Toronto: Henry Frowde. 1909. pp. xxvi, 404.

NOTES ON MASSACHUSETTS PRACTICE with Reference to Proceedings before Masters and Auditors and their Reports. By Frank Paul. Boston: Little, Brown and Company. 1909. pp. xxvi, 234. 8vo.

BRIEF MAKING AND THE USE OF LAW BOOKS. By William M. Lile, Henry S. Redfield, Eugene Wambaugh, Edson R. Sunderland, Alfred F. Mason, and Roger W. Cooley. Second Edition by Roger W. Cooley. St. Paul: West Publishing Company. 1909. pp. xii, 574. 8vo.

THE LAWS OF ENGLAND. By the Right Honorable the Earl of Halsbury and other lawyers. In about 20 volumes. Volumes VII and VIII. London: Butterworth and Company; Rochester: Lawyers Coöperative Publishing Company; Philadelphia: Cromarty Law Book Company. 1909. pp. clxvi, 544, 37; cxxviii, 693, 42. 8vo.

THE HOUSE OF LORDS ON THE LAW OF TRESPASS TO REALTY AND CHILDREN AS TRESPASSERS. By Thomas Beven. London: Stevens and Haynes. 1909. pp. 48.

FREE PRESS ANTHOLOGY. Compiled by Theodore Schroeder. New York: The Truth Seeker Publishing Company. 1909. pp. viii, 266. 8vo.

SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY. Volume III. By various authors. Compiled and Edited by a Committee of the Association of American Law Schools. Boston: Little, Brown and Company. 1909. pp. vi, 862.

A TREATISE ON THE RULES AGAINST PERPETUITIES, RESTRAINTS ON ALIENATION AND RESTRAINTS ON ENJOYMENT IN PENNSYLVANIA. By Roland R. Foulke. Philadelphia: George T. Bisel Company. 1909. pp. xxxii, 548.



# HARVARD LAW REVIEW.

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VOL. XXIII.

DECEMBER, 1909.

NO. 2.

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## WHAT LAW GOVERNS THE VALIDITY OF A CONTRACT.

### II. THE PRESENT CONDITION OF THE AUTHORITIES.

#### *England.*

IN England, as has been said, the law intended by the parties is the law which governs the validity of a contract. This doctrine is stated in an ingenious and original form by Professor Dicey. "The essential validity of a contract is (subject to the exceptions herein-after mentioned) governed indirectly by the proper law of the contract. . . . Proper law of the contract means the law, or laws, by which the parties to a contract intended or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves."<sup>1</sup> This rule thus formulated by Professor Dicey expresses excellently well the purport of the English decisions.

In applying this doctrine certain presumptions are allowed, or at least certain circumstances are given weight. Thus the law of the place of making is *prima facie* the law intended;<sup>2</sup> or the law of the flag;<sup>3</sup> or the law indicated by the form of the document;<sup>4</sup> or the law

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<sup>1</sup> Conf. Laws, 2 ed., pp. 545, 529.

<sup>2</sup> *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589.

<sup>3</sup> *Lloyd v. Guibert*, 6 B. & S. 100, L. R. 1 Q. B. 115.

<sup>4</sup> *Chartered Mercantile Bank v. Netherlands I. S. N. Co.*, 10 Q. B. D. 521; *In re Missouri S. S. Co.*, 42 Ch. D. 321; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *Royal Exch. Assur. Corp. v. Sjörforsakrings Vega*, [1901] 2 K. B. 567; [1902] 2 K. B. 384; *Spurrier v. La Cloche*, [1902] A. C. 446.

of the place of performance.<sup>1</sup> And when a foreign government is party to a contract, the law of such government is applied.<sup>2</sup>

A new point was raised by the case of *Bank of Africa v. Cohen*.<sup>3</sup> In this case a married woman in England had given a power of attorney to transfer her land in the Transvaal to the plaintiff bank, as security for advances thereafter made to her husband. By the English law she was capable of contracting or transferring land. By the law of the Transvaal she could transfer or contract to transfer the land *as surety for her husband* only if she had some pecuniary interest in the transaction or expressly waived the benefit of the law which protected her; which was not the case here. The registrar having refused to transfer the land in the Transvaal, this suit was brought in England, asking, first, for a decree of specific performance "of the agreement contained in the deed — for the transfer to the plaintiffs of the said property"; second, for an injunction against proceedings in the Transvaal to recover documents of title and against transferring title; third, for damages.

The Divisional Court and the Court of Appeal dismissed the bill, on the ground that the question was one of capacity to enter into a contract; and that (according to the opinion of Mr. Dicey)<sup>4</sup> the capacity of parties to a contract to convey land must be determined by the *lex rei sitae*.

This case might be dismissed as a decision solely on a question of capacity, were it not that the question was not in fact as to the woman's capacity, but whether certain formalities required by the *lex situs* had been fulfilled. By the law of the Transvaal a married woman may convey land; the capacity is not lacking. If the land is conveyed as security for a debt of her husband, certain formalities must be accomplished; but this is not a question of capacity, but of form of contracting.<sup>5</sup> As this point was distinctly made and was the basis of the decision in the important matrimonial cases of *Sottomayor v. De*

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<sup>1</sup> *South African Breweries v. King*, [1899] 2 Ch. 173, [1900] 1 Ch. 273; *Moulis v. Owen*, [1907] 1 K. B. 746. It is a rather striking fact that in all the cases cited in this and the preceding notes except in note (3) the court, by devious ways, found that the parties intended the law of England to govern.

<sup>2</sup> *Smith v. Weguelin*, L. R. 8 Eq. 198.

<sup>3</sup> [1909] 2 Ch. 129 (C. A.).

<sup>4</sup> *Conf. Laws*, 2 ed., p. 501.

<sup>5</sup> *Gorrell Barnes*, Pres. in *Ogden v. Ogden*, [1908] P. 46, 52.



Barros<sup>1</sup> and *Ogden v. Ogden*,<sup>2</sup> it is probable that it will at least be argued when the question arises that *Bank of Africa v. Cohen* is authority for the general proposition that the validity of a contract for the conveyance of land is to be determined by the *lex rei sitae*.

In answer to this it may well be urged that the question decided was really not raised by the case, for several reasons.

In the first place, the so-called "agreement" was merely a power of attorney, in the ordinary form, to transfer the land. It contained no agreement whatever to convey the land to the bank, still less to refrain from conveying it to another. Even assuming that the court, interpreting the document, could find by implication a contract to convey, the plaintiff could not, in accordance with the English authorities, obtain a decree. First, no decree for a conveyance of foreign land will be made by an English court where, as here, the conveyance cannot be made by merely giving a deed, but must be accomplished by an act done in the foreign country.<sup>3</sup> Second, no decree for the specific performance of a negative agreement will be granted by an English court where it would not accomplish the general object of the contract unless by indirection it compelled the performance of a positive term of the contract, and especially not where the negative agreement is not in express terms, but only by implication.<sup>4</sup> Third, no suit is permitted in an English court where (as here, on the prayer for injunction against claiming the title deeds) the title to foreign land is involved,<sup>5</sup> or where (as here, on the prayer for damages) the suit concerns foreign land.<sup>6</sup>

It thus appears that the question of the validity of the contract was not involved in this case; and it is therefore not certain that the case establishes any general principles as to the validity of contracts for the sale of foreign land; and the English law must be regarded as still unsettled.<sup>7</sup>

<sup>1</sup> 3 P. D. 1, distinguishing on that ground *Simonin v. Mallac*, 2 Sw. & Tr. 67.

<sup>2</sup> [1908] P. 46, distinguishing on that ground *Sottomayor v. De Barros*, and following *Simonin v. Mallac*.

<sup>3</sup> *Waterhouse v. Stansfield*, 10 Hare 254.

<sup>4</sup> *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416.

<sup>5</sup> *British S. A. Co. v. Comp. de Moçambique*, [1893] A. C. 602.

<sup>6</sup> *Sydney Municipal Council v. Bull*, [1909] 1 K. B. 7, 12.

<sup>7</sup> See Dicey, *Conf. Laws*, 2 ed., p. 810. The Massachusetts court in a case cited by counsel, has decided that a contract for the sale of land, as distinguished from a conveyance, is governed by the law of the place of making. *Polson v. Stewart*, 167 Mass. 211.

*English Colonies.*

The law of the English colonies follows that laid down by the English courts; and therefore where the contract itself contains a clause providing that the law of a certain country shall govern the contract, that law is applied.<sup>1</sup>

*Federal Courts.*

The condition of the authorities in the Federal courts is confused and puzzling. No doctrine can be said to have been adopted by the Supreme Court to the exclusion of other inconsistent doctrines. An examination of important typical decisions on the point under consideration will sufficiently indicate the condition of the problem.

1. In *Wayman v. Southard*,<sup>2</sup> Chief Justice Marshall adopted the principle that the intention of the parties determined the law applicable to a contract: "A contract is governed by the law with a view to which it was made."

2. In the next important decision<sup>3</sup> the court adopted the form (which has become the classic form in this country) that "the law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place where it is to be executed." *Robinson v. Bland* and two early New York cases were cited as authorities. This rule is in effect, of course, the rule that the place of performance strictly governs the validity of a contract.

3. A few years later was decided the case of *Andrews v. Pond*,<sup>4</sup> an action upon a bill of exchange to which the defense was usury. The bill was drawn in New York on Alabama, and violated the laws of both states; but the two laws differed as to the effect of the illegality. The court first asserted that contracts made in one place to be executed in another are to be governed by the law of the place of performance. But this, the learned Chief Justice said, is because the parties are permitted by the place of contract to make a contract in accordance

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<sup>1</sup> *Bunnell v. Shilling*, 28 Ont. 336; *Johnson v. Mutual L. I. Co.*, 5 New So. W. 16.

<sup>2</sup> 10 Wheat. 1 (1825).

<sup>3</sup> *Cox v. U. S.*, 6 Pet. 172 (1832).

<sup>4</sup> 13 Pet. 65 (1839).



with the law of the place of performance; and if the parties do not choose to abide by the latter law, the law of the place of making controls their acts. By this ingenious but complex theory the law of the place of contracting governs; but that law is that contracts may be made either in accordance with the local provisions, or if the parties so choose in accordance with the laws of the state of performance. This theory gives the parties an option, but only as between the laws of two places.

4. In *Scudder v. Union Bank*<sup>1</sup> the question was as to the validity of an oral acceptance in one state of a bill of exchange payable in another. The court held that this question was to be determined by the law of the place of contracting, and stated the general principle thus:

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit was brought. A careful examination of the well-considered decisions of this country and of England will sustain these positions."

5. In *Pritchard v. Norton*<sup>2</sup> the question was as to the validity of a bond executed in New York, and performable in Louisiana. The consideration was invalid by the law of New York. The reasoning of the court, in holding the bond valid, was that a contract is governed by the law with a view to which it was made; that it is made with a view to performance, and therefore with a view to the law of the place of performance; and that the latter law therefore governs its validity. It was mentioned in this case as an additional reason for holding the contract to be governed by the law of Louisiana, that the law of that place would make it valid, and the parties must have made it with a view to the law which would make it valid.

6. In *Liverpool and Great Western Steam Co. v. Phenix Insurance Co.*,<sup>3</sup> a case identical in its facts with the English case *In re Missouri Steamship Co.*, already cited, the court held that a contract is governed by the law of the place of making unless the parties clearly

<sup>1</sup> 91 U. S. 406 (1875).

<sup>2</sup> 106 U. S. 124 (1882).

<sup>3</sup> 129 U. S. 397 (1889).

manifest at the time of entering into the contract a mutual intention that it shall be governed by the law of some other country.

7. In *Equitable Life Insurance Co. v. Clements*<sup>1</sup> and in *Fowler v. Equitable Trust Co.*<sup>2</sup> the court held that a contract is necessarily subject to the statutory provisions of the place of contracting.

8. In *Hall v. Cordell*,<sup>3</sup> a case identical in its facts with *Scudder v. Union Bank*, already examined, the court held that the law of the place of payment governed the validity of an oral acceptance. "Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties."

9. In *London Assurance v. Companhia de Moagens*<sup>4</sup> the court said that "generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation."

10. In *Mutual Life Insurance Co. v. Cohen*<sup>5</sup> the court asserted that "the presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof."

11. In two late insurance cases<sup>6</sup> it has been intimated that an express incorporation into the contract of a provision that the laws of a certain state should govern the validity of the contract would be effective; but this has not been expressly decided.

It will thus be seen that almost every rule ever suggested for determining the law applicable to the validity of a contract which has ever been seriously urged in a common-law court has at one time or another been adopted by the Supreme Court of the United States as the basis of its decision; that each decision has been made apparently without realizing its inconsistency with former decisions;<sup>7</sup> and that

<sup>1</sup> 140 U. S. 222 (1891).

<sup>2</sup> 141 U. S. 384 (1891).

<sup>3</sup> 142 U. S. 116 (1891).

<sup>4</sup> 167 U. S. 149 (1897).

<sup>5</sup> 179 U. S. 262 (1900).

<sup>6</sup> *Mutual L. I. Co. v. Cohen*, 179 U. S. 262 (1900); *Mutual L. I. Co. v. Hill*, 193 U. S. 551 (1904).

<sup>7</sup> Mr. Justice Gray, in *Liverpool S. Co. v. Phenix Ins. Co.*, *supra*, does indeed speak of "the great preponderance, if not the uniform concurrence, of authority"; but this appears to be an almost unique realization of the condition of the authorities. In *Hall v. Cordell*, *supra*, Mr. Justice Harlan cites *Scudder v. Union Bank* as an authority on the local law of Illinois, but not on the principle of conflict of laws involved, though the decision in *Hall v. Cordell* on that point was exactly opposed to that in *Scudder v. Union Bank*.



many of the decisions are self-contradictory. As is natural where the judges come from different states where different views are held, the opinion is apt to express the doctrine accepted in the state from which the judge came. Thus, Mr. Justice Gray, in *Liverpool Steam Co. v. Phenix Insurance Co.*, expresses in substance the rule accepted in Massachusetts; while Mr. Justice Peckham, in *London Assurance v. Companhia de Moagens*, expresses the view firmly established in New York. It is natural that the inferior federal courts should reflect the same confusion of opinion. It would be almost impossible to make a complete citation of the decisions and *dicta* of these courts on the general question; those cases which have been found have been collected and classified in an appendix.

### *Alabama.*

The doctrine of the Alabama court is expressed in the following quotation from Story:

"A contract, as to its nature, obligation, and validity, is to be governed by the law of the state where made, unless it is to be performed in another state. When the contract is expressly or tacitly to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties — that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance."<sup>1</sup>

In other words, Alabama has squarely accepted the law of the place of performance as the law governing the validity of a contract.<sup>2</sup> Where a contract is to be performed in the place where it was made, or where no place of performance is expressly named, it is commonly said that the law of the place of making governs;<sup>3</sup> thus in this case also following Story's language. But this form of rule

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<sup>1</sup> Accepted from Story in *Hanwick v. Andrews*, 9 Port. 9, 26; reaffirmed in the latest case, *Southern Exp. Co. v. Gibbs*, 46 So. 465 (1908).

<sup>2</sup> *Hawley v. Bibb*, 69 Ala. 52; *Western U. T. Co. v. Way*, 83 Ala. 542, 4 So. 844; *Peet v. Hatcher*, 112 Ala. 514.

<sup>3</sup> *Goodman v. Munks*, 8 Port. 84 (*semble*); *Dunn v. Adams*, 1 Ala. 527 (*semble*); *Givens v. Western Bank*, 2 Ala. 397; *Miller v. McIntyre*, 9 Ala. 638; *Peake v. Yeldell*, 17 Ala. 636 (*semble*); *Jones v. Jones*, 18 Ala. 248 (*semble*); *McDougald v. Rutherford*, 30 Ala. 253; *Walker v. Forbes*, 31 Ala. 9; *Evans v. Kittrell*, 33 Ala. 449; *Henderson v. Adams*, 35 Ala. 723; *Broughton v. Bradley*, 36 Ala. 689; *Ensley Lumber Co. v. Lewis*, 121 Ala. 94; *Kraus v. Gorry*, 146 Ala. 548.

is confined to cases where the contract is not expressly performable elsewhere.<sup>1</sup>

In *Southern Railway v. Harrison*,<sup>2</sup> the court intimated that if the parties had in view some other law the court would apply it. This intimation seems not to have been adopted in general; but in usury cases it is not without support. These cases must be regarded here, as in many jurisdictions, as a class by themselves.

In usury cases the general rule seems to be that either the law of the place of making or that of the place of performance may be selected to make the contract valid,<sup>3</sup> so long at least as the place of making was not chosen *mala fide*, with the mere purpose of evading the usury law of the place of performance.<sup>4</sup> The question remains whether the parties can stipulate for any other law than that of the place of making or of performance; for instance the law of the situs of mortgaged land. The question was left open in the first case where it was raised.<sup>5</sup> In *Falls v. United S. L. & B. Co.*,<sup>6</sup> where the loan was made and payable in Alabama, but expressly provided that it should be governed by the law of Minnesota where the loan company was domiciled, it was held that the law of Alabama governed and the contract was void because the company was forbidden to do business in Alabama. But in *Ashurst v. Ashurst*,<sup>7</sup> where the loan was made and payable in New York, secured by mortgage of land in Alabama where the debtor lived, and the contract contained an express agreement that it should be governed by the law of Alabama, it was held that that law applied. In *United States S. & L. Co. v. Beckley*,<sup>8</sup> the contract being both made and to be performed in Minnesota and the law of Minnesota being stipulated for in the con-

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<sup>1</sup> *Cowles v. Townsend*, 37 Ala. 77; *Cubbedge v. Napier*, 62 Ala. 518; *McGarry v. Nicklin*, 110 Ala. 559. See however one case where the court in a contract of shipment appears to have followed the law of the place of shipment and not that of the place of delivery. *Mobile & G. R. R. v. Copeland*, 63 Ala. 219. In the same sort of case the court subsequently followed the law of the place of performance. *Southern Exp. Co. v. Gibbs*, 46 So. 465.

<sup>2</sup> 119 Ala. 539.

<sup>3</sup> *Farrior v. New England U. S. Co.*, 88 Ala. 277; *American F. L. M. Co. v. Sewell*, 92 Ala. 163.

<sup>4</sup> *Hayes v. B. & L. Assoc.*, 124 Ala. 663; *Pioneer S. & L. Co. v. Nonnemacher*, 127 Ala. 521, 545; *Farmers' S. & B. & L. Assoc. v. Kent*, 131 Ala. 246.

<sup>5</sup> *American F. L. M. Co. v. Sewell*, 92 Ala. 163.

<sup>6</sup> 97 Ala. 417.

<sup>7</sup> 119 Ala. 219.

<sup>8</sup> 137 Ala. 119.



tract, that also was allowed to govern as to usury. The same decision was made in *Allen v. Riddle*,<sup>1</sup> where the loan was expressly payable in the foreign state, though made in Alabama.

It must be said, then, that in all contracts where the question is not one of usury the law of the place of performance governs; in usury cases that law which would avoid the taint of usury, even perhaps a law chosen by the parties which is neither the law of the place of making nor of the place of performance.

### Arkansas.

It was said in the earliest cases, and continues to be said,<sup>2</sup> that the law of the place of making governs the validity of a contract; and this is the language of the latest case.<sup>3</sup> In most if not all the cases this is a mere *dictum*, as the contract was, so far as appears, both made and payable in the same state.<sup>4</sup> In one usury case<sup>5</sup> it was intimated, that by the ordinary rule the parties were to be regarded as contracting with reference to the law of the place of performance, but where that would make the agreement void they would be regarded as adopting the law of the place of making. In a case,<sup>6</sup> however, where a contract was made in Arkansas or Missouri, and performable partly in Arkansas and partly in the Indian Territory, the court said that the law of its place of performance governed each portion of the contract; quoting Wharton's Conflict of Laws as follows: "The place where an obligation originates is often accidental; is remote, sometimes receding from spot to spot, as we search for it; and is extrinsic to the essence of the engagement, and to its subsequent development and efficiency. It is different, however, with the place of

<sup>1</sup> 141 Ala. 621.

<sup>2</sup> *Lane v. Levillian*, 4 Ark. 76; *Howcott v. Kilbourn*, 44 Ark. 213; *State M. F. I. Assoc. v. Brinkley S. & H. Co.*, 61 Ark. 1; *Kelley v. Telle*, 66 Ark. 464.

<sup>3</sup> *Franklin L. I. Co. v. Morrell*, 84 Ark. 511. "The contract was executed in the state of Illinois, where the insurance society was domiciled, and where this member then resided. It was therefore an Illinois contract, and must be construed according to the laws of that state."

<sup>4</sup> *Bowles v. Eddy*, 33 Ark. 645; *Parsons Oil Co. v. Boyett*, 44 Ark. 230; *Matthews v. Paine*, 47 Ark. 54; *Bank of Harrison v. Gibson*, 60 Ark. 269; *Sawyer v. Dickson*, 66 Ark. 77; *Farmers' S. & B. & L. Assoc. v. Ferguson*, 69 Ark. 352; *Crebbin v. Deloney*, 70 Ark. 493; *Franklin L. I. Co. v. Galligan*, 71 Ark. 295; *Mutual R. F. L. Assoc. v. Minehart*, 72 Ark. 630; *Hough v. Maupin*, 73 Ark. 518.

<sup>5</sup> *Whitlock v. Cohn*, 72 Ark. 83. And see *Bank of Harrison v. Gibson*, 60 Ark. 269.

<sup>6</sup> *Midland Valley Ry. v. Moran N. & B. M. Co.*, 80 Ark. 399.

performance, which enters into the vitals of the obligation, so far as concerns its fulfilment.”<sup>1</sup>

This was said, however, of the validity of a railroad lien, which is clearly governed by the law of the situs.

In *Mutual R. F. L. Assoc. v. Minehart*,<sup>2</sup> a policy made and performable in Arkansas contained a provision that it should be governed by the laws of New York. The court held that this did not constitute the laws of New York the laws by which the validity of the contract was to be determined; but simply made them a part of the contract, to be construed like any other provision of it. In other words, the obligation, if any, must be created by the laws of Arkansas; if it was created, then the New York provisions took place as a term of the agreement.

### *California.*

The question seems seldom to have arisen. In a case where a contract of carriage was made in Missouri for delivery in California the court said that the law of the place where the contract is made governs, unless the parties at the time of making it had some other law in view.<sup>3</sup> But in a later case,<sup>4</sup> an action on an insurance policy, the court took a different view, saying that “as the contract provides for performance in San Francisco, the California law must govern.” The law of California is therefore left doubtful on the authorities.

### *Colorado.*

In most of the cases<sup>5</sup> the place of making and performance were the same, and the court held that that law governed, on the ground that the validity of a contract is determined by the law of the place of making. And the doctrine was repeated in a suit against the endorser of commercial paper, where the place of endorsement and of payment were different.<sup>6</sup> The law of Colorado therefore seems settled in favor of the law of the place of contracting.

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<sup>1</sup> 2 Conf. Laws, 2 ed., §§ 398, 399.

<sup>2</sup> 72 Ark. 630.

<sup>3</sup> *Palmer v. Atchison T. & S. F. R. R.*, 101 Cal. 187.

<sup>4</sup> *Progreso S. S. Co. v. St. Paul F. & M. I. Co.*, 146 Cal. 279.

<sup>5</sup> *Wolf v. Burke*, 18 Col. 264; *Des Moines L. Assoc. v. Owen*, 10 Col. App. 131.

<sup>6</sup> *Sullivan v. German Nat. Bank*, 18 Col. 99.



*Connecticut.*

In the earliest cases it was said that the law of the place where the contract is entered into governs the validity of the contract;<sup>1</sup> though in these cases no different place of performance was in question. And this view has been accepted in a few classes of cases later. Thus in cases of carriage it had been held that the law of the place of making governs;<sup>2</sup> and in cases of sale in one state for delivery in another, the law of the former state has been held to apply to the sale.<sup>3</sup> It was however intimated in an early case that if "it is perceived from their tenor that they were entered into with a view to the laws of some other state" contracts are governed by such other law.<sup>4</sup> Later, still a third view was adopted by the court, to wit, that the law of the place of performance must necessarily govern a contract.<sup>5</sup> Finally the rule appears to have been adopted that the intention of the parties governs, but that they are presumed to intend the law of the place of performance. The doctrine is thus enunciated by the court:

"When the contract is to be performed elsewhere, or is to have its entire beneficial operation and effect elsewhere, then the law of the latter place is to govern; because in the absence of anything to the contrary, it is presumed that the parties so intended."<sup>6</sup>

*District of Columbia.*

In two cases of commercial paper, where the obligation was both made and payable in one state, it was held to be governed as to its

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<sup>1</sup> *Bowne v. Olcott*, 2 Root 353; *Vermont S. Bank v. Porter*, 5 Day 316; *Brackett v. Norton*, 4 Conn. 517; *Roe v. Jerome*, 18 Conn. 138; *Downer v. Chesebrough*, 36 Conn. 39.

<sup>2</sup> *Camp v. Hartford & N. Y. S. B. Co.*, 43 Conn. 333.

<sup>3</sup> *Johnson C. S. Bank v. Walker*, 80 Conn. 509; *Moline J. Co. v. Dinnan*, 81 Conn. 111, 70 A. 634.

<sup>4</sup> *Smith v. Mead*, 3 Conn. 253; *Hale v. New Jersey S. N. Co.*, 15 Conn. 539; *Great-head v. Walton*, 40 Conn. 226.

<sup>5</sup> *Richardson v. Rowland*, 40 Conn. 565. In the case of *Webster v. Howe M. Co.*, 54 Conn. 394, the place of making and of performance was the same; and the law of that place was adopted.

<sup>6</sup> *Chillingworth v. Eastern T. W. Co.*, 66 Conn. 306; *Beggs v. Bartels*, 73 Conn. 132.

nature and validity by the law of that state.<sup>1</sup> In the latest case<sup>2</sup> the court adopted the intention of the parties as the governing circumstance, and followed *Liverpool & Great Western Steam Co. v. Phenix Insurance Co.* in holding that the law of the place of making prevails unless the parties clearly appear to have some other law in view.

### Florida.

In the only case the court held that the law of the place of making governed;<sup>3</sup> but no place of performance was named, and the alternative urged was the law of the domicil of the contracting company.

### Georgia.

In Georgia the earliest case<sup>4</sup> held that the validity of a contract must be determined by the law of the place of making; the court saying: "If a contract be void in its origin, it is inconceivable how validity can be given to it in any other country. It is no contract from the beginning." In the next case, however, the court intimated *obiter* that there was an exception to this general rule where the contract was payable elsewhere by its terms.<sup>5</sup> This *dictum* was accepted, and it became the settled rule in Georgia that the validity of a contract is determined by the law of the place of performance.<sup>6</sup> It has been held, however, that a contract absolutely void at the place of making cannot be validated by the law of the place of performance.<sup>7</sup> Of course where a contract is both made and payable in a state, the law of that state governs;<sup>8</sup> and it has been held that where a contract is performable in part in the state of making, and in part elsewhere, the law of the place of making governs.<sup>9</sup> The contrary has however

<sup>1</sup> *Gallaudet v. Sykes*, 1 McArth. 489; *Lockwood v. Lindsey*, 6 App. D. C. 396.

<sup>2</sup> *Croissant v. Empire S. R. Co.*, 29 App. D. C. 538 (1907).

<sup>3</sup> *Pace v. Pace*, 19 Fla. 438.

<sup>4</sup> *Cox v. Adams*, 2 Ga. 158.

<sup>5</sup> *Levy v. Cohen*, 4 Ga. 1.

<sup>6</sup> *Vanzandt v. Arnold*, 31 Ga. 210; *Dunn v. Welsh*, 62 Ga. 241.

<sup>7</sup> *Hager v. Nat. G. A. Bank*, 105 Ga. 116, following an intimation in *Martin v. Johnson*, 84 Ga. 481.

<sup>8</sup> *Hill v. Wilker*, 41 Ga. 449; *Champion v. Wilson*, 64 Ga. 184; *Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603.

<sup>9</sup> *Martin v. Johnson*, 84 Ga. 481.



been held in carrier cases where a shipment was made in another state for carriage to Georgia and delivery there; the court has applied the law of Georgia not only in matters connected with the delivery but even in determining the validity of a limitation of liability.<sup>1</sup>

While the law of the place of performance appears to be accepted in general as the law applicable to the contract the court has in some cases applied the law intended by the parties. Thus in contracts of insurance, where the law of the state of domicil of the insurance company was expressly adopted in the policy and the place of the contract agreed to be there, this provision has been enforced when it did not conflict with the policy of the forum, which was the place of making the contract.<sup>2</sup>

As in many states, the usury cases must be treated by themselves as exceptional. In general, the parties are permitted to choose their law. Of course, where the loan is made and payable in the borrower's state, the law of that state applies.<sup>3</sup> And where a note made in Georgia was made payable in Massachusetts merely to avoid the Georgia usury laws it was held that the Georgia law should be applied.<sup>4</sup> But where the parties select *bona fide* a law which really bears a relation to their agreement, the court will give effect to their choice. So where the parties expressly agreed upon the law of the place of making that was enforced.<sup>5</sup> And where a loan payable in New York was made in Georgia and was secured on Georgia land, the court, upon the intent that Georgia law should apply being found, held the loan valid according to that law.<sup>6</sup> In that case the question of intent appears to have been left to the jury. The parties are not restricted to the laws of the places of making and performance. Thus where the loan was both made and payable in New York, but the borrower was in Georgia, and it was secured by a mortgage of real estate there, the court said the parties evidently intended a Georgia contract, and it was held valid according to that law.<sup>7</sup> But in a precisely similar case the court held that there was no proof of an intention to

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<sup>1</sup> Southern Exp. Co. v. Shea, 38 Ga. 519; Carter v. Southern Ry., 3 Ga. App. 34; Atlanta & W. P. R. v. Broome, 3 Ga. App. 641.

<sup>2</sup> Massachusetts B. L. Assoc. v. Robinson, 104 Ga. 256; Missouri S. L. I. Co. v. Lovelace, 1 Ga. App. 446.

<sup>3</sup> Hollis v. Covenant B. & L. Assoc., 104 Ga. 318.

<sup>4</sup> Kilcrease v. Johnson, 85 Ga. 600.

<sup>5</sup> New England M. S. Co. v. McLaughlin, 87 Ga. 1.

<sup>6</sup> Underwood v. American M. Co., 97 Ga. 238.

<sup>7</sup> Jackson v. American M. Co., 88 Ga. 756.

be governed by any other law, and it was therefore governed by the law of New York.<sup>1</sup>

### *Illinois.*

In most of the cases in this state the law of the place of making has been applied as the proper law to determine the validity of a contract;<sup>2</sup> though in most of the cases in which this rule was laid down there was in fact no other place of performance.<sup>3</sup> But this was never the undisputed doctrine of the Illinois courts. In a very early case the court spoke incidentally but confidently of "the rule that the law of the place of payment is to govern;"<sup>4</sup> and this supposed rule has in fact been applied by the court in a few cases.<sup>5</sup> While this rule has little support on the authorities, the rule that the parties may choose their law was stated early,<sup>6</sup> and has often been applied since.<sup>7</sup> In the case of *Adams v. Robinson*<sup>8</sup> the doctrine was most ingeniously stated by the court in a way to reconcile it with the principle most generally accepted:

"The laws of the country where a contract is made are obligatory upon the parties, and upon principle no contract declared void by those laws ought to be enforced in any other country. . . . The laws of every country allow parties to enter into obligations with reference to the laws of the country where such obligations are to be performed; although such obligations may not be in accordance with the laws of the country where they

<sup>1</sup> *Odom v. New England M. S. Co.*, 91 Ga. 505.

<sup>2</sup> *Bradshaw v. Newman*, 1 Ill. 133 [94]; *Stacy v. Baker*, 2 Ill. 417; *Schuttler v. Piatt*, 12 Ill. 417; *Crouch v. Hall*, 15 Ill. 263; *Phinney v. Baldwin*, 16 Ill. 108; *Smith v. Whitaker*, 23 Ill. 367; *Anstedt v. Sutter*, 30 Ill. 164; *Barber v. Bell*, 77 Ill. 490; *Miller v. Wilson*, 146 Ill. 523; *McCoy v. Griswold*, 114 Ill. App. 556.

<sup>3</sup> *Sherman v. Gasset*, 9 Ill. 521; *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 398; *Roundtree v. Baker*, 52 Ill. 241; *Milwaukee & S. P. Ry. v. Smith*, 74 Ill. 197; *Evans v. Anderson*, 78 Ill. 558; *Burchard v. Dunbar*, 82 Ill. 450; *Gay v. Rainey*, 89 Ill. 221; *Pope v. Hanke*, 155 Ill. 617; *Schlee v. Guckenheimer*, 179 Ill. 593; *Coverdale v. Royal Arcanum*, 193 Ill. 91.

<sup>4</sup> *Holbrook v. Vibbard*, 3 Ill. 465.

<sup>5</sup> *Lewis v. Headley*, 36 Ill. 433; *Wooley v. Lyon*, 117 Ill. 244 (seemingly overruling *Holbrook v. Vibbard*, 3 Ill. 465 and *Belford v. Bangs*, 15 Ill. App. 76 on the facts); *Price v. Burns*, 101 Ill. App. 418 (seemingly opposed on principle to *Anstedt v. Sutter*, 30 Ill. 164); *North P. & P. Co. v. Western U. T. Co.*, 70 Ill. App. 275 (seemingly opposed on principle to *Pennsylvania Co. v. Fairchild*, 69 Ill. 260, and other cases cited in note 1, p. 93).

<sup>6</sup> *Strawbridge v. Robinson*, 10 Ill. 470.

<sup>7</sup> *McAllister v. Smith*, 17 Ill. 328; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260.

<sup>8</sup> 37 Ill. 45.



are made as regards obligations to be performed in that country they may be strictly in accordance with such laws as to obligations to be performed in other countries. The right to enter into contracts with reference to the laws of another country is one allowed by nations for the convenience of those transacting business within their respective territorial limits, to enable them to obtain such rights as they could have secured in the country where the contract is to be performed by a just observance of its laws. No nation can be justly required to allow persons subject to its laws to enter into contracts without reference to and not in accordance either with its own laws or with the laws of the country where the contract is to be performed."

This doctrine that the parties may choose between the law of the place of contracting and that of the place of performance has been applied in the case of the carriage of goods from one state to another, the court holding that since the contract was made and was partly performed in one state, the parties must be taken to have contracted with reference to the law of that state.<sup>1</sup>

### *Indiana.*

The doctrine commonly laid down in this state is that the law of the place of making a contract governs. This was first applied in cases where the place of making and of performance were the same;<sup>2</sup> but it has been adhered to in general for cases of all kinds,<sup>3</sup> even where the place of making and the place of performance differed.<sup>4</sup> In usury cases, however, the court has allowed the parties to contract with reference either to the law of the place of making or of that of performance.<sup>5</sup>

One class of cases was treated exceptionally. In cases of commer-

<sup>1</sup> *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Michigan C. R. R. v. Boyd*, 91 Ill. 268; *Illinois C. R. R. v. Beebe*, 174 Ill. 13; *Western T. Co. v. Hosking*, 19 Ill. App. 607; *Wald v. Pittsburg C. C. & S. L. R. R.*, 60 Ill. App. 460. But *contra* in the case of a telegram. *North P. & P. Co. v. Western U. T. Co.*, 70 Ill. App. 275.

<sup>2</sup> *Titus v. Scantling*, 4 Blackf. 89; *Yeatman v. Cullen*, 5 Blackf. 240; *Smith v. Blatchford*, 2 Ind. 184; *Hall v. Harris*, 16 Ind. 180; *Pratt v. Wallbridge*, 16 Ind. 147; *Mindenhall v. Gately*, 18 Ind. 149.

<sup>3</sup> *Alford v. Baker*, 53 Ind. 279; *Sondheim v. Gilbert*, 117 Ind. 71.

<sup>4</sup> *Union C. L. I. Co. v. Thomas*, 46 Ind. 44; *Bethell v. Bethell*, 54 Ind. 428; *Keiwert v. Meyer*, 62 Ind. 587; *Fisher v. Parry*, 68 Ind. 465; *Equitable L. A. Soc. v. Perkins*, 41 Ind. App. 183, 80 N. E. 682.

<sup>5</sup> *Smith v. Muncie Bank*, 29 Ind. 158; *Pancoast v. Travellers' Ins. Co.*, 79 Ind. 172; *Thompson v. Edwards*, 85 Ind. 414.

cial paper made in one state and payable in another the court repeatedly said that the law of the place of payment governed the nature and validity of the obligation.<sup>1</sup> But in the latest case<sup>2</sup> these cases are all explained away or distinguished and the law of the place of making is applied to the obligation. The case leaves it a little uncertain whether this law is applied on the ground that it is absolutely required by the rule, or whether it is applied as the law presumably intended by the parties.

### *Iowa.*

The law of the place of making was laid down in the earliest cases as the law governing the validity of a contract;<sup>3</sup> and it seems still to be adhered to in determining the validity of contracts for the sale of chattels.<sup>4</sup> But it was soon held that in usury cases at least the parties might choose that law which would make the contract valid;<sup>5</sup> and in favor of validity of a debt secured by mortgage even the law of the domicil of the debtor, where the mortgaged land was situated, has been applied though the contract of loan was made and performable elsewhere.<sup>6</sup> And the expressed intention of the parties has also been rendered effective in insurance cases.<sup>7</sup>

But the later cases seem to have adopted the law of the place of performance as the law governing validity;<sup>8</sup> probably still with the limitation, early suggested,<sup>9</sup> that a contract forbidden by statute at

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<sup>1</sup> *Hunt v. Standart*, 15 Ind. 33 (see *Mix v. State Bank*, 13 Ind. 521); *Rose v. Thames Bank*, 15 Ind. 292; *Rose v. Park Bank*, 20 Ind. 94; *Browning v. Merritt*, 61 Ind. 425; *Lindeman v. Rosenfield*, 67 Ind. 246; *Fordyce v. Nelson*, 91 Ind. 447; *Midland Steel Co. v. Citizens' Nat. Bank*, 34 Ind. App. 107, 72 N. E. 290.

<sup>2</sup> *Garrigue v. Keller*, 164 Ind. 676.

<sup>3</sup> *Bernard v. Barry*, 1 G. Greene, 388; *Bean v. Briggs*, 4 Ia. 464; *Davis v. Bronson*, 6 Ia. 410; *Thorp v. Craig*, 10 Ia. 461; *Huse v. Hamblin*, 29 Ia. 101.

<sup>4</sup> *Engs v. Priest*, 65 Ia. 232; *Bowlin Liquor Co. v. Brandenburg*, 130 Ia. 220.

<sup>5</sup> *Butters v. Old*, 11 Ia. 1; *Bigelow v. Burnham*, 83 Ia. 120.

<sup>6</sup> *Arnold v. Potter*, 22 Ia. 194.

<sup>7</sup> *Johnson v. New York L. I. Co.*, 109 Ia. 708 (parties agreed on law of place of making); *Goodwin v. Provident S. L. A. Assoc.*, 97 Ia. 226 (parties agreed on law of place of performance).

<sup>8</sup> *Born v. Home Ins. Co.*, 120 Ia. 299 (*semble*); *Spinney v. Chapman*, 121 Ia. 38; *Banco de Sonora v. Bankers' M. C. Co.*, 100 N. W. 532 (which however was really a question concerning the method of performing the contract). In an earlier case where this rule was applied the question was as to the rate of interest. *Seymour v. Butler*, 8 Ia. 304.

<sup>9</sup> *McDaniel v. Chicago & N. W. Ry.*, 24 Ia. 412.



the place of making cannot be made good by any other law. And it appears to be settled that in case of a contract of carriage performable partly within and partly outside the state of shipment the validity of the obligation is "necessarily" determined by the law of the place of shipment.<sup>1</sup>

### *Kansas.*

The court first laid down the rule that the law of the place of making governed the validity of a contract,<sup>2</sup> soon, however, limiting it by adding, "unless it appears that they are to be performed in or according to the laws of another state."<sup>3</sup> And in case of a shipment of goods from one state to another, the court held that the parties must be assumed to have contracted with reference to the law of the place of shipment.<sup>4</sup>

In ordinary cases the rule finally adopted seems to be, that the law of the place of performance should govern validity.<sup>5</sup> But in the case of usury the court has taken a different view. The intention of the parties is given controlling weight, if it is formed *bona fide*, and not with the purpose of evading the law,<sup>6</sup> especially if that intention is expressed as a term of the contract.<sup>7</sup>

### *Kentucky.*

Where a contract is made and is expressly to be performed in one state, its validity is of course governed by the law of that state;<sup>8</sup> and

<sup>1</sup> *McDaniel v. Chicago & N. W. Ry.*, 24 Ia. 412; *Talbott v. Transp. Co.*, 41 Ia. 247; *Hazel v. Chicago M. & S. P. R. R.*, 82 Ia. 477; *Hudson v. Northern P. R. R.*, 92 Ia. 231. See, however, as to the "necessity," *Banco de Sonora v. Bankers' M. C. Co.*, 100 N. W. 532, where it was suggested that the law of each portion of the performance should govern it.

<sup>2</sup> *Feineman v. Sachs*, 33 Kan. 621.

<sup>3</sup> *Briggs v. Latham*, 36 Kan. 255.

<sup>4</sup> *Pacific Exp. Co. v. Foley*, 46 Kan. 457.

<sup>5</sup> *Alexandria A. & F. S. R. R. v. Johnson*, 61 Kan. 417 (where the place of making and of performance appear to have been the same); *Alexander v. Braker*, 64 Kan. 396; *Sykes v. Citizens Nat. Bank*, 98 Pac. 206.

<sup>6</sup> *Royal Loan Assoc. v. Foster*, 68 Kan. 468. Great stress is laid in this case and in *People's B. L. & S. Assoc. v. Kidder*, 9 Kan. App. 385, on the fact that the land lay in Kansas, and the enforcement of the mortgage must therefore be there; but a careful examination shows that the court was speaking only of the right to enforce the contract in Kansas, and that it contemplated the possibility of its nevertheless being valid by another law.

<sup>7</sup> *Midland S. & L. Co. v. Solomon*, 71 Kan. 185; *Steinman v. Midland S. & L. Co.*, 79 Pac. 1077.

<sup>8</sup> *Johnson v. U. S. Bank*, 2 B. Mon. 310; *Hyatt v. Bank of Kentucky*, 8 Bush,

the same is true where, no place of performance being named, the contract is presumed to be performable at the place of making.<sup>1</sup> And where a contract is performable in part at the place of making and in part in another state, its validity is governed by the law of the place of making.<sup>2</sup>

The generally accepted doctrine, however, though it is actually the ground of decision in only a few cases, is that the law of the place of performance named in the contract, if any place is so named, governs.<sup>3</sup> This rule is, however, subject to this limitation; that if the contract is void for illegality at the place of making, the law of the place of performance cannot give it validity.<sup>4</sup>

### *Louisiana.*

In most of the cases there was no place of performance named, or the contract was performable in the place of making. In all such cases the rule stated is, that the law of the place of making governs.<sup>5</sup>

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193; *Young v. Bullen*, 19 Ky. L. Rep. 1561, 43 S. W. 687; *Arnett v. Pinson*, 108 S. W. 852.

<sup>1</sup> *Steele v. Curle*, 4 Dana, 381; *Thomas v. Beckman*, 1 B. Mon. 29; *Cross v. Petree*, 10 B. Mon. 413; *Young v. Harris*, 14 B. Mon. 556; *Piner v. Clary*, 17 B. Mon. 661; *Jameson v. Gregory*, 4 Met. 363; *Archer v. Nat. Ins. Co.*, 2 Bush, 226; *Carlisle v. Chambers*, 4 Bush, 268; *Ford v. Buckeye Ins. Co.*, 6 Bush, 133; *Stevens v. Gregg*, 89 Ky. 461; *Gibson v. Sublett*, 4 Ky. L. Rep. 730; *Fally v. Steinfield*, 10 Ky. L. Rep. 982. The liability of the endorser of commercial paper is to pay at the place of endorsement, not at the place of payment of the principal obligation; and the validity and nature of an endorsement is therefore governed by the law of the place of endorsement, though the paper is payable elsewhere. *Short v. Trabue*, 4 Met. 299.

<sup>2</sup> *Cleveland C. C. & S. L. R. R. v. Druen*, 26 Ky. L. Rep. 103, 80 S. W. 778 (contract of carriage). But *contra* of the undertaking of a telegraph company: *Western U. T. Co. v. Eubanks*, 100 Ky. 591.

<sup>3</sup> *Goddin v. Shipley*, 7 B. Mon. 575; *Tyler v. Trabue*, 8 B. Mon. 306; *Western U. T. Co. v. Eubanks*, 100 Ky. 591. In a late insurance case, however, the court seems to have accepted the doctrine that the intent of the parties would govern, stating the presumption that they intended the law of the place of making. *Washington L. I. Co. v. Glover*, 78 S. W. 146, 25 Ky. L. Rep. 1327. See, however, *U. S. S. & L. Co. v. Scott*, 98 Ky. 695, where the expressed intention of the parties was not given effect.

<sup>4</sup> *Ohio & M. Ry. v. Tabor*, 98 Ky. 503; *Western U. T. Co. v. Eubanks*, 100 Ky. 591.

<sup>5</sup> No place of performance named: *Vidal v. Thompson*, 11 Mart. 23; *Evans v. Gray*, 12 Mart. 475; *Baldwin v. Gray*, 4 Mart. N. S. 192; *Ory v. Winter*, 4 Mart. N. S. 277; *Ferguson v. Flower*, 4 Mart. N. S. 312; *Saul v. His Creditors*, 5 Mart. N. S. 569; *Astor v. Price*, 7 Mart. N. S. 408; *King v. Harman*, 6 La. 607; *Gates v. Renfroe*, 7 La. Ann. 569; *Newton v. Gray*, 10 La. Ann. 67; *Grove v. Nutt*, 13 La. Ann. 117; *Serra v. Hoffman*, 30 La. Ann. 67; *Grevenig v. Washington L. I. Co.*, 112 La. 879.



And in a well-considered early decision the court held that the law of the place of making and not of performance governed the nature and validity of the contract.<sup>1</sup> But in several cases where the court held that the law of the place of contracting governed, they added the limitation, unless it was performable elsewhere or made with reference to some other law.<sup>2</sup> And in the case of a contract for a lease of land, the law of the place of making was not applied, but the law of the situs, where the contract was to be performed.<sup>3</sup>

### *Maine.*

After laying down the general rule that a contract is governed by the law of the place of making, in several cases where in fact no place of performance was named,<sup>4</sup> and in one case where the rule seems to have been necessary to the result,<sup>5</sup> the court in later cases has suggested other rules, though in every case that has yet been decided the court has in fact applied the law of the place of making. Thus in *Bell v. Packard*,<sup>6</sup> the court, in applying the law of the place of making, admitted the truth of counsel's argument that a contract might be made with reference to the law of the place of performance. In *Carey v. Mackey*<sup>7</sup> the court was willing to admit that "the general rule is, that contracts are to be interpreted" according to the law of the place of performance, but "there are some exceptions when the question pertains to the validity of the contract rather than to the meaning of its provisions," and the rule itself was more applicable to commercial than to other contracts. And in *Emerson Co. v. Proctor*<sup>8</sup> the court, after laying down and following the "general rule gov-

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Place of making and of performance the same: *Clague v. Creditors*, 2 La. 114; *Barrett v. Walker*, 14 La. 303; *Long v. Templeman*, 24 La. Ann. 564; *Lachman v. Block*, 47 La. Ann. 505.

<sup>1</sup> *Depau v. Humphrey*, 8 Mart. N. S. 1. And see *Lynch v. Postlethwaite*, 7 Mart. 69.

<sup>2</sup> *Shiff v. Louisiana S. I. Co.*, 6 Mart. N. S. 629; *Malpica v. McKown*, 1 La. 248; *Arayo v. Currell*, 1 La. 528; *Trabue v. Short*, 18 La. Ann. 257.

<sup>3</sup> *Stanton v. Harvey*, 44 La. Ann. 511. The fact that the contract was one concerning land was mentioned, but seems not to have been the ground of decision.

<sup>4</sup> *Maguire v. Pingree*, 30 Me. 508; *Stickney v. Jordan*, 58 Me. 106; *Lindsay v. Hill*, 66 Me. 212; *Wright v. Andrews*, 70 Me. 86. This general rule was repeated later without limitation or exception in *Roads v. Webb*, 91 Me. 406.

<sup>5</sup> *Bailey v. Hope Ins. Co.*, 56 Me. 474; insurance effected in Maine on New Hampshire property by a Rhode Island company: validity governed by the law of Maine.

<sup>6</sup> 69 Me. 105.

<sup>7</sup> 82 Me. 516.

<sup>8</sup> 97 Me. 360.

erning the construction of a contract, that its validity is to be determined by the law of the place where it is made," felt it well to reënforce its decision by adding that the parties were "presumed to have contracted with reference to the laws of Maine," and that the inference to be drawn was "that the parties in fact regarded it as a Maine contract."

The court has never seriously considered the problem; the cases have in fact all been decided in accordance with the law of the place of making; the *dicta* approving other rules are confused and ill-considered. It would seem safest to place Maine among the states which accept the doctrine that the law of the place of contracting governs validity.

### *Maryland.*

In several cases where the place of making and of performance was the same, the law of that place has been held to apply.<sup>1</sup> In the case of a contract of insurance made in Maryland, it is held that the parties cannot avoid the effect of a Maryland statute by a provision in the policy that it shall be governed by the law of the domicil of the company.<sup>2</sup>

### *Massachusetts.*

It has been repeatedly and forcibly laid down as a general rule in this state that the law of the place of contracting determines the validity of a contract.<sup>3</sup> In a few cases the court has referred to

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<sup>1</sup> *Stevens v. Rasin F. Co.*, 87 Md. 679; *Latrobe v. Winans*, 89 Md. 636; *New York S. & T. Co. v. Davis*, 96 Md. 81. In the early case of *De Sobry v. De Laistre*, 2 Harr. & J. 191, there is a *dictum* to the effect that in such a case the law of the place of performance governs.

<sup>2</sup> *Robinson v. Hurst*, 78 Md. 59; *Mutual L. I. Co. v. Mullen*, 107 Md. 457.

<sup>3</sup> The rule has been laid down without limitation in the following cases, where no place of performance separate from the place of making was expressed:

*Williams v. Wade*, 1 Met. 82; *McIntyre v. Parks*, 3 Met. 207; *Warren v. Copelin*, 4 Met. 594; *Daniels v. Hudson R. F. I. Co.* 12 Cush. 416; *Heebner v. Eagle Ins. Co.*, 10 Gray, 131; *Pine v. Smith*, 11 Gray, 38; *Lawrence v. Bassett*, 5 All. 140; *Stevenson v. Payne*, 109 Mass. 378; *Dolan v. Green*, 110 Mass. 322; *Thwing v. Great W. I. Co.*, 111 Mass. 93; *Woodruff v. Hill*, 116 Mass. 310; *Morris v. Penn. M. L. I. Co.*, 120 Mass. 503; *Murphy v. Collins*, 121 Mass. 6; *Stanton v. Demerritt*, 122 Mass. 495; *Shoe & L. N. Bank v. Wood*, 142 Mass. 563; *Harvey v. Merrill*, 150 Mass. 1; *Baxter Nat. Bank v. Talbot*, 154 Mass. 213; *Reliance M. I. Co. v. Sawyer*, 160 Mass. 413; *Emery v. Burbank*, 163 Mass. 326; *King B. M. Co. v. Phoenix Ins. Co.*, 164 Mass. 291; *Wylie v. Cotter*, 170 Mass. 356; *Commonwealth M. F. I. Co. v. William*



the rule that the law of the place of performance governs, or that the law intended by the parties governs, with approval; but in no case has this been necessary to the decision.<sup>1</sup> And in several cases where the places of making and of performance were different the court has held the nature and validity of the obligation to be subject to the law of the place of making,<sup>2</sup> even though the parties especially provided for the adoption of another law.<sup>3</sup> In *Akers v. Demond*<sup>4</sup> the court, accepting the "general principle" that the law of the place of performance is the law of the contract, held that this is confined to the effect of the contract; the validity must be determined by the law of the place of making and "no other law can apply to it." When contracts are void by the law of that state they are void everywhere; they never acquire a legal existence.

The question was sharply presented by the case of *Polson v. Stewart*.<sup>5</sup> A contract for the sale of land in Massachusetts had been made in North Carolina between a wife and her husband; such an obligation could not be created in Massachusetts but it was valid in North Carolina. Massachusetts was the place of performance, and, as the situs of the land, the place which the parties contemplated as most concerned with the contract. The court nevertheless held that the contract was valid, and would be enforced in Massachusetts. Chief Justice Field dissented, on the ground taken by Dicey and the late

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*Knabe & Co. Mfg. Co.*, 171 Mass. 265; *Johnson v. Mutual L. I. Co.*, 180 Mass. 407; *Daniell v. Boston & M. R. R.*, 184 Mass. 337; *Nashua Sav. Bank v. Sayles*, 184 Mass. 520; *Callender M. & T. Co. v. Flint*, 187 Mass. 104; *Cherry v. Sprague*, 187 Mass. 113; *Jennings v. Moore*, 189 Mass. 197; *Bearse v. McLean*, 199 Mass. 242.

So in cases of carriage where the place of contracting is also the place where performance begins.

*Fonseca v. Cunard S. S. Co.*, 153 Mass. 553; *O'Regan v. Cunard S. S. Co.*, 160 Mass. 356; *Brockway v. American Exp. Co.*, 168 Mass. 257.

<sup>1</sup> *Powers v. Lynch*, 3 Mass. 77; *Carnegie v. Morrison*, 2 Met. 381; *Brockway v. American Exp. Co.*, 171 Mass. 158; *Mittenthal v. Mascagni*, 183 Mass. 19. In *Penobscot & K. R. R. v. Bartlett*, 12 Gray, 244, the law of the place of performance was squarely adopted; but the question had to do with manner of payment, not with the validity of the obligation.

<sup>2</sup> *Powers v. Lynch*, 3 Mass. 77; *Carnegie v. Morrison*, 2 Met. 381; *Holmes v. Manning*, 19 N. E. 25; *Millard v. Brayton*, 171 Mass. 533.

<sup>3</sup> *Dolan v. Mutual R. F. L. Assoc.*, 173 Mass. 197. The court evidently felt that such a term of the contract would be ineffective, even if there were no provision of the *lex loci* against it; but the express clause adopting another law not being on the face of the policy, as required by a statute of the place of making, it was held invalid.

<sup>4</sup> 103 Mass. 318.

<sup>5</sup> 167 Mass. 211.

English case examined above, that a contract concerning land is governed by the law of the situs.

It thus appears that Massachusetts is pretty firmly committed to the doctrine that the validity of a contract is necessarily governed by the law of the place of making.

*Joseph H. Beale.*

[*To be continued.*]

## APPENDIX: FEDERAL CASES.

### I. PLACE OF MAKING.

In many cases the court without especially considering the matter, sometimes without reciting the place of performance at all, ruled that the law of the place of making governs the contract.

*Slocum v. Pomeroy*, 6 Cranch, 221; *De Wolf v. Johnson*, 10 Wheat. 367; *Boyle v. Zacharie*, 6 Pet. 635; *Duncan v. U. S.*, 7 Pet. 435; *Tilden v. Blair*, 21 Wall. 241; *Supreme Lodge v. Meyer*, 198 U. S. 508; *Shattuck v. Mutual L. I. Co.*, 4 Cliff. 598; *Sortwell v. Hughes*, 1 Curt. 244; *White v. Conn. M. L. I. Co.*, 4 Dill. 177; *McClintock v. Cummins*, 3 McLean, 158; *Dundas v. Bowler*, 3 McLean, 397; *Mott v. Wright*, 4 Biss. 53; *Lamb v. Lamb*, 6 Biss. 420; *Lamb v. Bowser*, 7 Biss. 315, 372; *Newcomb v. Mutual L. I. Co.*, Fed. Cas. No. 10,147; *Mather v. American Exp. Co.*, 2 Fed. 49; *Campbell v. Crampton*, 2 Fed. 417; *Northwestern M. L. I. Co. v. Elliott*, 5 Fed. 225, 7 Sawy. 17; *Schuenfeldt v. Junkerman*, 20 Fed. 357; *Swann v. Swann*, 21 Fed. 299; *Stubbs v. Colt*, 30 Fed. 417; *Ward v. Vosburgh*, 31 Fed. 12; *Wall v. Equitable L. A. Soc.*, 32 Fed. 273; *Richter v. Frank*, 41 Fed. 859; *Garrettson v. North Atchison Bank*, 47 Fed. 867; *Knights T. & M. L. I. Co. v. Berry*, 50 Fed. 511; *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 52 Fed. 191; *Equitable L. A. Soc. v. Winning*, 58 Fed. 541; *Hicks v. National L. I. Co.*, 60 Fed. 690; *Thomas v. Wabash S. L. & P. R. R.*, 63 Fed. 200; *Anheuser-Busch B. Assoc. v. Bond*, 66 Fed. 653; *Central R. R. v. Kavanaugh*, 92 Fed. 56; *Bank of Topeka v. Eaton*, 95 Fed. 355; *Mutual L. I. Co. v. Hathaway*, 106 Fed. 815; *Fidelity M. L. Assoc. v. Jeffords*, 107 Fed. 402; *Albro v. Manhattan L. I. Co.*, 119 Fed. 629; *Carrollton F. M. Co. v. American C. I. Co.*, 124 Fed. 25; *Robinson v. Suburban B. Co.*, 127 Fed. 804.

Thus the law of the place of making is adopted as opposed to the law of the domicile of the parties,

*Alexander v. Southern H. B. & L. Assoc.*, 120 Fed. 963; *Schinotti v. Whitney*, 130 Fed. 780; *Northwestern S. S. Co. v. Mar. Ins. Co.*, 161 Fed. 166;

or the place from which the offer is sent,

*Equitable L. A. Soc. v. Nixon*, 81 Fed. 796; *Equitable L. A. Soc. v. Trimble*, 83 Fed. 85;



or the place where a document is signed, prior to its taking effect elsewhere as an obligation,

*Buchanan v. Drovers' Nat. Bank*, 55 Fed. 223; *Aultman v. Holder*, 68 Fed. 467; *Phipps v. Harding*, 70 Fed. 468.

The doctrine of *Scudder v. Union Bank*, that where a contract is made in one place to be performed in another the law of the place of making governs the nature and validity of the obligation, is accepted in several cases.

*Scudder v. Union Bank*, 91 U. S. 406; *Equitable L. I. Co. v. Clements*, 140 U. S. 226; *Howenstein v. Barnes*, 5 Dill. 482; *Brown v. American F. Co.*, 31 Fed. 516; *Exchange Bank v. Hubbard*, 62 Fed. 112; *Providence S. L. A. Soc. v. Hadley*, 102 Fed. 856.

This has been held in two usury cases, though in that class of cases the decision is usually otherwise.

*Davis v. Clemson*, 6 McLean, 622; *Kuhn v. Morrison*, 75 Fed. 81.

In *Blackwell v. Webster*, 23 Blatch. 537, where the agreement was forbidden by law at the place of making, the court said that "there is no room to apply the fiction of law, that the place of performance of a contract is to be deemed the place of making it."

## II. PLACE OF PERFORMANCE.

In a smaller number of cases it has been held that the law of the place of performance governs the validity of the contract.

*Bell v. Bruen*, 1 How. 169; *London Assurance v. Companhia de Moagens*, 167 U. S. 149; *Kent v. Dawson Bank*, 13 Blatch. 237; *Oregon & W. T. & I. Co. v. Rathbun*, 5 Sawy. 32; *Payson v. Withers*, 5 Biss. 269; *Desmazes v. Mutual B. L. I. Co.*, Fed. Cas., No. 3821; *Whitcomb v. Phoenix M. L. I. Co.*, Fed. Cas., No. 17,530; *Neederer v. Barber*, Fed. Cas., No. 10,079; *Interstate B. & L. Assoc. v. Edgefield H. Co.*, 120 Fed. 422; *Smith v. Mutual L. I. Co.*, 5 Fed. 582; *Pacific S. S. L. & B. Co. v. Green*, 123 Fed. 43; *Berry v. Chase*, 146 Fed. 625 (where it would seem that what was called the place of performance was really the place of making).

But where there is more than one place of performance, it has been held that the parties must *ex necessitate* be referred to the law of the place of making.

*Morgan v. New Orleans M. & T. R. R.*, 2 Woods, 244.

## III. PLACE MAKING THE CONTRACT VALID.

In usury cases the court has often said that if the place of performance would hold an agreement void for usury, the law of the place of making may be resorted to for making the contract valid.

Andrews *v.* Pond, 13 Pet. 65; Junction R. R. *v.* Bank of Ashland, 12 Wall. 226; Kellogg *v.* Miller, 2 McCrary, 395; Sturdivant *v.* Memphis Nat. Bank, 60 Fed. 730; Andruss *v.* People's B. & L. Assoc., 94 Fed. 575; Dygert *v.* Vermont L. & T. Co., 94 Fed. 913.

#### IV. PLACE INTENDED BY THE PARTIES.

In some cases the court seeks to find the intention of the parties, and governs the contract by that.

Wayman *v.* Southard, 10 Wheat. 1 (*semble*); Gibson *v.* Conn. F. I. Co., 77 Fed. 561.

This is the rule most commonly laid down in the usury cases, where the parties are presumed to intend the law of the place of making or of the place of performance, according to which would make the contract valid.

Miller *v.* Tiffany, 1 Wall. 298; Cromwell *v.* Sac County, 96 U. S. 51; Fitch *v.* Remer, 1 Flip. 15; Matthews *v.* Murchison, 17 Fed. 760.

So in other than usury cases.

Hubbard *v.* Exchange Bank, 72 Fed. 234.

But where both laws would make the agreement usurious, the intention of the parties is allowed no weight, and the law of the place of making governs.

Andrews *v.* Pond, 13 Pet. 65; Heath *v.* Griswold, 18 Blatch. 555.

The doctrine that the intention of the parties governs, but that the parties are presumed to intend their contract to be governed by the law of the place of making, is accepted in a few cases.

Liverpool & G. W. S. Co. *v.* Phenix Ins. Co., 129 U. S. 397; Mutual L. I. Co. *v.* Cohen, 179 U. S. 262; Green *v.* Collins, 3 Cliff. 494; Potter *v.* The Majestic, 60 Fed. 624.

And in a few cases, on the other hand, the law of the place of performance is presumed to be that intended by the parties.

Pritchard *v.* Norton, 106 U. S. 124; Hall *v.* Cordell, 142 U. S. 116; Johnson *v.* Norton Co., 159 Fed. 361.

Where a bond is given to the United States, as required by law, it is presumed to be given in Washington and subject to the law of the District of Columbia.

Cox *v.* U. S., 6 Pet. 172; U. S. *v.* Stephenson, 1 McLean, 462.

When the parties expressly agree that a contract shall be subject to a certain law, in other words, when their intention is expressed, it has been



intimated, though never expressly decided by the Supreme Court, that the court will give effect to this intention.

Penn. M. L. I. Co. v. Mechanics S. B. & T. Co., 72 Fed. 413; Mutual L. I. Co. v. Phinney, 178 U. S. 327 (*semble*), affirming Mutual L. I. Co. v. Hill, 97 Fed. 263; Mutual L. I. Co. v. Hill, 193 U. S. 551 (*semble*), affirming s. c., 118 Fed. 708.

This may be a point not open to possible dispute, as where it amounts to fixing perfectly legal terms of agreement.

Mutual L. I. Co. v. Dingley, 100 Fed. 408.

But it is certain that no such stipulation will be given effect where it is regarded as against public policy,

Phillips v. Energia, 56 Fed. 124; Lewisohn v. National S. S. Co., 56 Fed. 602; Brotany W. Mills v. Knott, 76 Fed. 582;

or where the parties would thereby avoid the provisions of a statute of the place of making.

Equitable L. I. Co. v. Clements, 140 U. S. 222; Fowler v. Equitable Trust Co., 141 U. S. 384; Fletcher v. New York L. I. Co., 13 Fed. 526; Berry v. Indemnity Co., 46 Fed. 439; Mutual B. L. I. Co. v. Robison, 54 Fed. 580; Mutual L. I. Co. v. Hathaway, 106 Fed. 815; Albro v. Manhattan L. I. Co., 119 Fed. 629.

## THE JUVENILE COURT.

THE past decade marks a revolution in the attitude of the state toward its offending children, not only in nearly every American commonwealth, but also throughout Europe, Australia, and some of the other lands. The problem of the delinquent child, though juristically comparatively simple, is, in its social significance, of the greatest importance, for upon its wise solution depends the future of many of the rising generation. The legal questions, while not complicated, have, nevertheless, given rise to some discussion and to some slight dissent from the standpoint of constitutional law.

The first thought which suggests itself in connection with the juvenile court is, What is there distinctively new about it? We are familiar with the conception that the state is the higher or the ultimate parent of all of the dependents within its borders. We know that, whatever may have been the historical origin of the practice, for over two centuries, as evidenced by judgments both of the House of Lords and of the Chancellors, the courts of chancery in England have exercised jurisdiction for the protection of the unfortunate child.

The proposition that the court of chancery could not act unless the infant had property, was declared by North, J., in *Re McGrath*,<sup>1</sup> to be wholly unsupported by either principle or authority. He added:

"In *In re Spence*, 2 Ph. 247, Lord Chancellor Cottenham said: 'I have no doubt about the jurisdiction. The cases in which the court interferes on behalf of infants are not confined to those in which there is property. . . . This court interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae* and the exercise of which is delegated to the great seal.'"

In the early case of *Cowles v. Cowles*<sup>2</sup> Caton, J., said:

"The power of the court of chancery to interfere with and control not only the estates but the persons of all minors within the limits of its

<sup>1</sup> [1892] 2 Ch. 496. See also *In re Flynn*, 2 DeG. & Sm. 457 (1848); *Brown v. Collins*, 25 Ch. D. 56 (1883); *In re Scanlan*, 40 Ch. D. 200 (1888); *In re Neven*, [1891] 2 Ch. 299; *Barnardo v. McHugh*, [1891] A. C. 388; *In re W.*, [1907] 2 Ch. 557; *In re H's Settlement*, [1909] 2 Ch. 260. Several of these cases involve questions of religious education of the child.

<sup>2</sup> 3 Gilman 435 (1846).



jurisdiction, is of very ancient origin and cannot now be questioned. This is a power which must necessarily exist somewhere in every well-regulated society, and more especially in a republican government. A jurisdiction thus extensive and liable, as we have seen, to enter into the domestic relations of every family in the community, is necessarily of a very delicate and even of a very embarrassing nature; and yet its exercise is indispensable in every well-governed society; it is indispensably necessary to protect the persons and preserve the property of those who are unable to protect and take care of themselves”;

and shortly thereafter in the case of *Miner v. Miner*<sup>1</sup> he enunciated the practically unanimous American doctrine that the parents' rights are always

“subject to control by the court of chancery when the best interests of the child demand it.”

Support was found for the contention that a property interest is essential to jurisdiction in the fact that, until comparatively recent times, the aid of the court in England was seldom sought, except when the child had an independent fortune; but, as was said by Lord Eldon, whose decree in the *Wellesley* case<sup>2</sup> was affirmed by the House of Lords,<sup>3</sup>

“It is not from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction, because the court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction fully and practically only where it has the means of applying property for the maintenance of the infant.”

This want has now been met both through the extension of the parental obligations and through public grants of money or institutions for the support, maintenance, and education of the children. The judges of the juvenile court, in exercising jurisdiction, have, in accordance with the most advanced philanthropic thought, recognized that the lack of proper home care can best be supplied by the true foster parent. Though the orphan asylums of the civilized world have ever been valuable and their recent improvement is marked, nevertheless, following the splendid lead of Massachusetts, greater effort is being put forth everywhere to solve the problem of the per-

<sup>1</sup> 11 Ill. 40 (1849).

<sup>2</sup> 2 Russ. 1 (1827).

<sup>3</sup> 2 Bligh N. S. 124 (1827).

manently dependent or neglected child by finding for it a foster home where it shall receive that individualized love and care that a true father gives to and would always desire for his own little ones.

While in most jurisdictions the juvenile-court laws make provision for the dependent as well as the neglected, the truant and the delinquent child, some of the best workers in this field have objected to a court's having anything to do with the strictly dependent child, the child whose parents must ask assistance, merely because of poverty or misfortune. If friends or the church fail to supply the necessary help, and the aid of the state is to be sought, it should be granted through poor law or relief commissioners. The court should be called upon to act only in the case of a persistent truant, or a victim of neglect or wrongdoing, either on the part of others or of itself. It is particularly in dealing with those children who have broken the law or who are leading the kind of life which will inevitably result in such breach, that the new and distinctive features of the juvenile-court legislation appear.

Our common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility, seven at common law and in some of our states, ten in others, with a chance of escape up to twelve, if lacking in mental and moral maturity. The majesty and dignity of the state demanded vindication for infractions from both alike. The fundamental thought in our criminal jurisprudence was not, and in most jurisdictions is not, reformation of the criminal, but punishment; punishment as expiation for the wrong, punishment as a warning to other possible wrongdoers. The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act — nothing else — and if it had, then of visiting the punishment of the state upon it.

It is true that during the last century ameliorating influences mitigated the severity of the old régime; in the last fifty years our reformatories have played a great and very beneficent part in dealing with juvenile offenders. They supplanted the penitentiary. In them the endeavor was made, while punishing, to reform, to build up, to educate the prisoner so that when his time should have expired he could go out into the world capable at least of making an honest living. And in course of time, in some jurisdictions, the youths were separated from



the older offenders even in stations, jails, and workhouses; but, nevertheless, generally in this country, the two classes were huddled together. The result of it all was that instead of the state's training its bad boys so as to make of them decent citizens, it permitted them to become the outlaws and outcasts of society; it criminalized them by the very methods that it used in dealing with them. It did not aim to find out what the accused's history was, what his heredity, his environments, his associations; it did not ask how he had come to do the particular act which had brought him before the court. It put but one question, "Has he committed this crime?" It did not inquire, "What is the best thing to do for this lad?" It did not even punish him in a manner that would tend to improve him; the punishment was visited in proportion to the degree of wrongdoing evidenced by the single act; not by the needs of the boy, not by the needs of the state.

To-day, however, the thinking public is putting another sort of question. Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.

And it is this thought—the thought that the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention of the public authorities; it is this principle, which, to some extent theretofore applied in Australia and a few American states, was first fully and clearly declared, in the Act under which the Juvenile Court of Cook County, Illinois, was opened in Chicago, on July 1, 1899, the Hon. R. S. Tuthill presiding. Colorado followed soon after, and since that time similar legislation has been adopted in over thirty American jurisdictions, as well as in Great Britain and Ireland, Canada, and the Australian colonies. In continental Europe and also in Asia the American juvenile courts have been the object of most careful study, and either by parliamentary or administrative

measures similar courts have been established, or at least some of their guiding principles have been enforced.

The Lord Advocate of Scotland, in the course of the debates last year on the Children's Bill,<sup>1</sup> stated that

"There was a time in the history of this House when a Bill of this kind would have been treated as a most revolutionary measure, and half a century ago, if such a measure had been introduced it would have been said that the British constitution was being undermined."

That era has passed away forever.

Juvenile-court legislation has assumed two aspects. In Great Britain, in New York, and in a few other jurisdictions the protection is accomplished by suspending sentence and releasing the child under probation, or, in case of removal from the home, sending it to a school instead of to a jail or penitentiary. The criminal proceeding remains, however. The child is charged with the commission of a definite offense, of which it must be found either guilty or not guilty. If not guilty of the one certain act, it is discharged, however much it may need care or supervision. If guilty, it is then dealt with, but as a criminal. And this would seem to be true even under the New York statute of May 25, 1909, which provides that

"A child of more than seven and less than sixteen years of age, who shall commit any act or omission, which, if committed by an adult, would be a crime not punishable by death or life imprisonment, shall not be deemed guilty of any crime, but of juvenile delinquency only. . . . Any child charged with any act or omission which may render him guilty of juvenile delinquency shall be dealt with in the same manner as now is or may hereafter be provided in the case of adults charged with the same act or omission except as specially provided heretofore in the case of children under the age of sixteen years."

This would seem to effectuate merely a change in the name of every crime or offense from that by which it was theretofore known to that of juvenile delinquency. Beyond question, much good may be accomplished under such legislation, dependent upon the spirit in which it is carried out, particularly if, as the English law provides, the conviction should not be regarded as a conviction of felony for the purposes of any of the disqualifications attached to felony.

But in Illinois, and following the lead of Illinois, in most jurisdictions,

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<sup>1</sup> 186 Hans. Parl. Deb., 4th series, 1251.



the form of procedure is totally different and wisely so. It would seem to be obvious that, if the common law could fix the age of criminal responsibility at seven, and if the legislature could advance that age to ten or twelve, it can also raise it to sixteen or seventeen or eighteen, and that is what, in some measure, has been done. Under most of the juvenile-court laws a child under the designated age is to be proceeded against as a criminal only when in the judgment of the judge of the juvenile court, either as to any child, or in some states as to one over fourteen or over sixteen years of age, the interests of the state and of the child require that this be done. It is to be observed that the language of the law should be explicit in order to negative the jurisdiction of the criminal courts in the first instance. In the absence of such express provision the Supreme Court of New Hampshire in *State v. Burt*<sup>1</sup> recently upheld a criminal conviction. On the other hand, the Supreme Court of Louisiana has decided in the case of *State v. Reed*<sup>2</sup> that a criminal proceeding against one within the age limit must be quashed and the case transferred to the juvenile court.

To get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma, — this is the work which is now being accomplished by dealing even with most of the delinquent children through the court that represents the *parens patriae* power of the state, the court of chancery. Proceedings are brought to have a guardian or representative of the state appointed to look after the child, to have the state intervene between the natural parent and the child because the child needs it, as evidenced by some of its acts, and because the parent is either unwilling or unable to train the child properly.

Objection has been made from time to time that this is nevertheless a criminal proceeding, and that therefore the child is entitled to a trial by jury and to all the constitutional rights that hedge about the criminal.

The Supreme Courts of several states have well answered this objection.

In *Commonwealth v. Fisher*<sup>3</sup> the court says:

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<sup>1</sup> 71 Atl. 30 (1908).

<sup>2</sup> 49 So. 3 (1909).

<sup>3</sup> 213 Pa. St. 48, 62 Atl. 198 (1905).

"To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection.

"The action is not for the trial of a child charged with a crime, but is mercifully to save it from such an ordeal, with the prison or penitentiary in its wake, if the child's own good and the best interests of the state justify such salvation. Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it. The act is but an exercise by the state of its supreme power over the welfare of its children, a power under which it can take a child from its father, and let it go where it will, without committing it to any guardianship or any institution, if the welfare of the child, taking its age into consideration, can be thus best promoted.

"The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority, and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated."

In one of the most recent decisions<sup>1</sup> the Supreme Court of Idaho thus refers to the juvenile court:

"Its object is to confer a benefit both upon the child and the community in the way of surrounding the child with better and more elevating influences, and of educating and training him in the direction of good citizenship and thereby saving him to society and adding a good and useful citizen to the community. This, too, is done for the minor at a time when he is not entitled, either by natural law or the laws of the land, to his absolute freedom, but rather at a time when he is subject to the restraint and custody of either a natural guardian or a legally constituted and appointed guardian to whom he owes obedience and subjection. Under this law the state, for the time being, assumes to discharge the parental duty and to direct his custody and assume his restraint.

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<sup>1</sup> *Ex parte Sharpe*, 15 Idaho 120, 96 Pac. 563 (1908).



"It would be carrying the protection of 'inalienable rights,' guaranteed by the Constitution, a long ways to say that that guaranty extends to a free and unlimited exercise of the whims, caprices, or proclivities of either a child or its parents or guardians for idleness, ignorance, crime, indigence, or any kindred dispositions or inclinations."

Years ago, in considering the power of the court to send a child to the House of Refuge, Chief Justice Gibson said :<sup>1</sup>

"May not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right the business of education belongs to it. That parents are ordinarily entrusted with it, is because it can seldom be put in better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held as they obviously are, at its sufferance? The right of parental control is a natural, but not an inalienable one. It is not excepted by the declaration of rights out of the subject of ordinary legislation."

Care must, however, be taken not to provide for dealing with the child as a criminal. The city of Detroit lacked, for a time, a juvenile court, as the result of the decision in *Robinson v. Wayne Circuit Judges*.<sup>2</sup> The Supreme Court of Michigan, following the cases cited and numerous others, overruled many objections urged against the constitutionality of the Detroit Juvenile Court Act, but nevertheless held it invalid, saying:

"The statute, it is true, declares that the proceedings shall not be taken to be criminal proceedings in any sense; and yet by section 14 it is provided that if the child be adjudged a delinquent child, the court may place the case on trial, and impose a fine not to exceed \$25.00, with costs, etc. This can have no other purpose than punishment for a delinquency, which means nothing less, or at least includes one who violates any law of this state or any city ordinance.

"In the present case, however, this statute is a state law, providing for a penalty. A complaint, an arrest, and trial are authorized, and, upon a determination, the imposition of a fine. It is difficult to conceive of any element of a criminal prosecution which may be said to be lacking. And, as section 28 of article 6 of the Constitution very plainly provides for a

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<sup>1</sup> *Ex parte Crouse*, 4 Whart. 9 (1838).

<sup>2</sup> 151 Mich. 315, 115 N. W. 682 (1908).

jury of twelve men in all courts of record in every criminal prosecution, the provision for a jury of six for the trial of delinquents is in violation of this section."

Further legislation has now corrected this defect.

In answer to the objection that the act has the effect of depriving a parent of the custody of his child, in violation of his constitutional rights, the Supreme Court of Idaho, in *Ex parte Sharpe*,<sup>1</sup> says:

"If the parent objects to the child's being taken care of by the state in the manner provided for by the act, he may appear and present his objections. If, on the other hand, he is not made a party to the hearing and proceeding, under all the recognized rules of legal procedure, he is clearly not bound by the judgment and none of his rights are precluded.

"The parent or guardian cannot be bound by the order or judgment of the Probate Court in adjudging a child delinquent and sending him to the Industrial Training School unless he has appeared or been brought into the proceeding in the Probate Court."

The Supreme Court of Utah, in *Mill v. Brown*,<sup>2</sup> emphasized this requirement when it said:

"Before the state can be substituted to the right of the parent, it must affirmatively be made to appear that the parent has forfeited his natural and legal right to the custody and control of the child by reason of his failure, inability, neglect, or incompetency to discharge the duty and thus to enjoy the right.

"Unless, therefore, both the delinquency of the child and the incompetency, for any reason, of the parent concur and are so found, the court exceeds its power when committing a child to any of the institutions contemplated by the act."

It is, therefore, important to provide, as has been done in the most recent statutes, but as was not done in the earlier acts, that the parents be made parties to the proceedings, and that they be given an opportunity to be heard therein in defense of their parental rights.

The Supreme Court of Illinois, however, in the case of *People ex rel. Schwartz v. McLain*,<sup>3</sup> struck a discordant note in a decision releasing a child from the State Training School for Boys. Subsequently, it granted a rehearing, and, because of the discontinuance thereafter of the *habeas corpus* proceedings, rendered no final judgment in the

<sup>1</sup> *Supra*.

<sup>2</sup> 88 Pac. 609 (1907).

<sup>3</sup> 38 Chi. Leg. N. 166 (1905).



cause. In the original opinion, which we may, in view of the rehearing, regard as retracted, the court, while upholding the constitutionality of the juvenile-court law in the case of a child whose parents actively contributed to its wrongdoing, said :

“If this enactment is effective and capable of being enforced as against the relator, father of the boy, it must be upon the theory that it is within the power of the state to seize any child under the age of sixteen years who has committed a misdemeanor, though the father may have always provided a comfortable, quiet, orderly, and moral home for him, and have supplied him with school facilities, had not neglected his moral training, and had been and was still ready to render him all the duties of a parent. We do not think it is within the power of the General Assembly to thus infringe upon parental rights.”

The answer to this, made by counsel in the argument on rehearing, would seem to be conclusive. They said :

“The boy incorrigible at home must be corrected by the state. Whether this correction be by fine, imprisonment, or commitment to school, is a matter which does belong to the legislature and not to this court to determine.

“This law applies, with equal force, to the son of the pauper and the millionaire, to the minister’s son (who is sometimes the wolf among the flock) as well as to the son of the convict and the criminal. The circumstances and disposition of the parents are not the test by which the state measures its power over the child; the right of the parent to retain the society and the services of the child is rightfully suspended when the parent is unsuccessful in keeping the child in a state of obedience to the criminal law of the state; he cannot keep his child and allow him to continue to violate the law of the state without successful check or barrier thereon, just because he has a comfortable and moral home.

“The manner in which the power of the state shall be exercised, and the extent to which the deprivation of the parent shall go, is a matter for the determination of the legislature, and the legislature by this Act has confided it to a court of chancery, where the parental power of the state has been lodged and exercised from time immemorial.”

They quote, too, the passage heretofore cited from the decision of Chief Justice Gibson in *Ex parte Crouse*, with this addition :

“The right of parental control is a natural but not an inalienable one. It is not excepted by the Declaration of Rights out of the subjects of ordinary legislation, and it consequently remains subject to the ordinary legislative

power, which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is constituted, cannot be doubted."

One more legal question remains. In a decision, characterized by the Supreme Court of Michigan in the Robinson case<sup>1</sup> as "now chiefly notable as an example of the vigor with which that which is not the law may be stated," the Supreme Court of Illinois, in *People ex rel. v. Turner*,<sup>2</sup> released a child from the reformatory on the ground that the reformatory was a prison; that incarceration therein was necessarily punishment for a crime, and that such a punishment could be inflicted only after criminal proceedings conducted with due regard to the constitutional rights of the defendant. Whether the criticism be just or not, the case suggests a real truth, and one which, in the enthusiastic progress of the juvenile-court movement, is in danger of being overlooked. If a child must be taken away from its home, if for the natural parental care that of the state is to be substituted, a real school, not a prison in disguise, must be provided. Whether the institutional life be only temporary until a foster home can be found, or for a longer period until the child can be restored to its own home or be given its complete freedom, the state must, both to avoid the constitutional objections suggested by the Turner case, and in fulfilment of its moral obligation to the child, furnish the proper care. This cannot be done in one great building, with a single dormitory for all of the two or three or four hundred or more children, in which there will be no possibility of classification along the lines of age or degrees of delinquency, in which there will be no individualized attention. What is needed is a large area, preferably in the country, — because these children require the fresh air and contact with the soil even more than does the normal child, — laid out on the cottage plan, giving opportunity for family life, and in each cottage some good man and woman who will live with and for the children. Locks and bars and other indicia of prisons must be avoided; human love, supplemented by human interest and vigilance, must replace them. In such schools there must be opportunity for agricultural and industrial training, so that when the boys and girls come out, they will be fitted to do a man's or woman's work in the world, and not be merely a helpless lot, drifting aimlessly about.

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<sup>1</sup> *Supra*.

<sup>2</sup> 55 Ill. 280 (1870).



Some states have begun to supply this need.<sup>1</sup> But despite the great ultimate financial saving to the state through this method of dealing with children, a saving represented by the value of a decent citizen as against a criminal, the public authorities are nowhere fully alive to the new obligations that the spirit as well as the letter of this legislation imposes upon them. It has, however, been specifically provided in Canada that before the Dominion Act shall be put into force in any province, the governor in council must be satisfied, among other things, that an industrial school, as defined by the Act, exists, to which juvenile delinquents may be committed.

Private philanthropy has supplemented, and doubtless in the future will supplement the work of the state in providing for the delinquents. To a large extent it is denominational, though many organizations are non-sectarian. None have accomplished more good or give promise of greater continued usefulness than the George Junior Republics and similar organizations that stand for self-government, self-reliance, and redemption through honest labor.

Some of the main principles involved in juvenile-court legislation were pointed out by Mr. Herbert Samuels, in introducing into the House of Commons his excellent Children's Bill. In reference to that part of the bill which has to do with juvenile offenders, he said <sup>2</sup> that it is based on three main principles:

*"The first* is that the child offender ought to be kept separate from the adult criminal, and should receive at the hands of the law a treatment differentiated to suit his special needs; that the courts should be agencies for the rescue as well as the punishment of children. We require the establishment through the country of juvenile courts — that is to say, children's cases shall be heard in a court held in a separate room or at a separate time from the courts which are held for adult cases, and that the public who are not concerned in the cases shall be excluded from admission.

*"In London* we propose to appoint by administrative action a special children's magistrate to visit in turn a circuit of courts. Further, we require police authorities throughout the whole of the country to establish places of detention to which children shall be committed on arrest, if they are not bailed, and on remand or commitment for trial, instead of being committed to prison.

*"The second principle* on which this bill is based is that the parent of

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<sup>1</sup> See the admirable report of the Commission to select a site for the N. Y. State Training School for Boys. N. Y. Sen. Doc. No. 39 (Apr. 28, 1909).

<sup>2</sup> 183 Hans. Parl. Deb., 4th series, 1434.

the child offender must be made to feel more responsible for the wrongdoing of his child. He cannot be allowed to neglect the up-bringing of his children, and having committed the grave offense of throwing on society a child criminal, wash his hands of the consequences and escape scot free. We require the attendance in court of the parent in all cases where the child is charged, where there is no valid reason to the contrary, and we considerably enlarge the powers, already conferred upon the magistrates by the Youthful Offenders Act of 1901, to require the parent, where it is just to do so, to pay the fines inflicted for the offense which his child has committed.

"*The third principle* which we had in view in framing this part of the bill is that the commitment of children in the common gaols, no matter what the offense may be that is committed, is an unsuitable penalty to impose. The government has come to the conclusion that the time has now arrived when Parliament can be asked to abolish the imprisonment of children altogether, and we extend this proposal to the age of sixteen with a few carefully defined and necessary exceptions."

To these, however, should be added, as the fourth principle, that taking a child away from its parents and sending it even to an industrial school is, as far as possible, to be avoided; and as the fifth and most important principle, that when it is allowed to return home, it must be under probation, subject to the guidance and friendly interest of the probation officer, the representative of the court. To raise the age of criminal responsibility from seven or ten to sixteen or eighteen, without providing for an efficient system of probation, would indeed be disastrous. Probation is, in fact, the keynote of juvenile-court legislation.

But even in this there is nothing radically new. Massachusetts has had probation, not only in the case of minors, but even in the case of adults, for nearly forty years, and several other states now have provisions for the suspension of a criminal sentence in the case of adults, permitting the defendant to go free, but subject to the control of a probation officer. Wherever juvenile courts have been established, a system of probation has been provided for, and even where as yet the juvenile-court system has not been fully developed, some steps have been taken to substitute probation for imprisonment of juvenile offenders.

Most of the children who come before the court are, naturally, the children of the poor. In many cases the parents are foreigners, frequently unable to speak English, and without an understanding



of American methods and views. What they need, more than anything else, is kindly assistance; and the aim of the court, in appointing a probation officer for the child, is to have the child and the parents feel, not so much the power, as the friendly interest of the state; to show them that the object of the court is to help them to train the child right; and therefore the probation officers must be men and women fitted for these tasks.

Their duties are oftentimes of the most delicate nature. Tact, forbearance, and sympathy with the child, as well as a full appreciation of the difficulties that the poorer classes, and especially the immigrants, are confronted with in our large cities, are indispensable. The New York Probation Commission say, in their second annual report for the year 1908, p. 32:

"In courts where the probation system is most effectively conducted there is great variety in the work done by probation officers. The most successful workers regard the receiving of reports from probationers as much less important than the visiting and other work done by the probation officers. The probation officers obtaining the best results enter into intimate friendly relations with their probationers, and bring into play as many factors as possible, such as, for instance, securing employment for their probationers, readjusting family difficulties, securing medical treatment or charity if necessary, interesting helpful friends and relatives, getting the coöperation of churches, social settlements and various other organizations, encouraging probationers to start bank accounts, to keep better hours, to associate with better companions, and so forth."

The procedure and practice of the juvenile court is simple. In the first place the number of arrests is greatly decreased. The child and the parents are notified to appear in court, and unless the danger of escape is great, or the offense very serious, or the home totally unfit for the child, detention before hearing is unnecessary. Children are permitted to go on their own recognizance or that of their parents, or on giving bail. Probation officers should be and often are authorized to act in this respect. If, however, it becomes necessary to detain the children either before a hearing or pending a continuance, or even after the adjudication, before they can be admitted into the home or institution to which they are to be sent, they are no longer kept in prisons or jails, but in detention homes. In some states, the laws are mandatory that the local authorities provide such homes managed in accordance with the spirit of this legislation. These are

feasible even in the smallest communities, inasmuch as the simplest kind of a building best meets the need.

The jurisdiction to hear the cases is generally granted to an existing court having full equity powers. In some cities, however, special courts have been provided, with judges devoting their entire time to this work. If these special courts can constitutionally be vested with full and complete chancery and criminal jurisdiction, much is to be said in favor of their establishment. In the large cities particularly the entire time of one judge may well be needed. It has been suggested from time to time that all of the judges of the municipal or special sessions courts be empowered to act in these cases, but while it would be valuable in metropolitan communities to have more than one detention home and court house, nevertheless it would seem to be even more important to have a single juvenile court judge. The British government has adopted this policy for London.

By the Colorado Act of 1909 provision is made for hearings before masters in chancery, designated as masters of discipline, to be appointed by the juvenile court judge and to act under his directions. This may prove to be the best solution of a difficult problem, combining as it does the possibility of a quick disposition of the simpler cases in many sections of a large city or county, with a unity of administration through the supervisory power of a single judge.

The personality of the judge is an all-important matter. The Supreme Court of Utah, in the case of *Mill v. Brown*,<sup>1</sup> commenting upon the choice of a layman, a man genuinely interested in children, pointed out that,

"To administer juvenile laws in accordance with their true spirit and intent requires a man of broad mind, of almost infinite patience, and one who is the possessor of great faith in humanity and thoroughly imbued with that spirit.

"The judge of any court, and especially a judge of a juvenile court, should be willing at all times, not only to respect, but to maintain and preserve, the legal and natural rights of men and children alike. . . . The fact that the American system of government is controlled and directed by laws, not men, cannot be too often or too strongly impressed upon those who administer any branch or part of the government. Where a proper spirit and good judgment are followed as a guide, oppression can and will be avoided. . . .

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<sup>1</sup> 88 Pac. 609 (1907).



"The juvenile-court law is of such vast importance to the state and society that it seems to us it should be administered by those who are learned in the law and versed in the rules of procedure, to the end that the beneficent purposes of the law may be made effective and individual rights respected. Care must be exercised both in the selection of a judge and in the administration of the law."

The decision but emphasizes the dangers which beset the path of the judge of the juvenile court. The public at large, sympathetic to the work, and even the probation officers who are not lawyers, regard him as one having almost autocratic power. Because of the extent of his jurisdiction and the tremendous responsibility that it entails, it is, in the judgment of the writer, absolutely essential that he be a trained lawyer thoroughly imbued with the doctrine that ours is a "government of laws and not of men."

He must, however, be more than this. He must be a student of and deeply interested in the problems of philanthropy and child life, as well as a lover of children. He must be able to understand the boys' point of view and ideas of justice; he must be willing and patient enough to search out the underlying causes of the trouble and to formulate the plan by which, through the coöperation, oftentimes, of many agencies, the cure may be effected.

In some very important jurisdictions the vicious practice is indulged in of assigning a different judge to the juvenile-court work every month or every three months. It is impossible for these judges to gain the necessary experience or to devote the necessary time to the study of new problems. The service should under no circumstances be for less than one year, and preferably for a longer period. In some of our cities, notably in Denver, the judge has discharged not only the judicial functions, but also those of the most efficient probation officer. Judge Lindsey's love for the work and his personality has enabled him to exert a powerful influence on the boys and girls that are brought before him. While doubtless the best results can be obtained in such a court, lack of time would prevent a judge in the largest cities from adding this work to his strictly judicial duties, even were it not extremely difficult to find the necessary combination of elements in one man.

The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in

the interest of the state to save him from a downward career. It is apparent at once that the ordinary legal evidence in a criminal court is not the sort of evidence to be heard in such a proceeding. A thorough investigation, usually made by the probation officer, will give the court much information bearing on the heredity and environment of the child. This, of course, will be supplemented in every possible way; but this alone is not enough. The physical and mental condition of the child must be known, for the relation between physical defects and criminality is very close. It is, therefore, of the utmost importance that there be attached to the court, as has been done in a few cities, a child study department, where every child, before hearing, shall be subjected to a thorough psycho-physical examination. In hundreds of cases the discovery and remedy of defective eyesight or hearing or some slight surgical operation will effectuate a complete change in the character of the lad.

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

The object of the juvenile court and of the intervention of the state is, of course, in no case to lessen or to weaken the sense of responsibility either of the child or of the parent. On the contrary, the aim is to develop and to enforce it. Therefore it is wisely provided in most of the recent acts that the child may be compelled when on probation, if of working age, to make restitution for any damage done by it. Moreover, the parents may not only be compelled to contribute to the support even of the children who are taken away from them and sent to institutions, but following Colorado, in many states, they, as well as any other adults, may be made criminally liable for their acts or neglect contributing to a child's dependency or delinquency. In most of the jurisdictions which have established separate juvenile courts, as well as in some of the others, all criminal cases affecting children are tried by the juvenile-court judge. In



drafting legislation of this kind, however, it must not be overlooked that if the proceedings against the adult are criminal, his constitutional rights must be carefully safeguarded. Following general principles, such penal acts are strictly construed, and therefore in the recent case of *Gibson v. People*<sup>1</sup> the Colorado Supreme Court limited the application of the Act of 1903 to the parents and those standing in a parental relation to the child. Colorado, in 1907, however, as well as other states, expressly extended the scope of such statutes so as to include any person, whether standing *in loco parentis* or not. The Supreme Court of Oregon in *State v. Dunn*<sup>2</sup> construed such legislation to refer only to misconduct not otherwise punishable.

Kentucky in 1908, followed by Colorado in 1909, has enacted a statute providing for the enforcement of parental obligations, not in the criminal but in the chancery branch of the juvenile court. A decree not merely for the payment of support money, but for the performance or omission of such acts, as under the circumstances of the case are found necessary, may be enforced by contempt proceedings.

Valuable, however, as is the introduction of the juvenile court into our system of jurisprudence, valuable both in its effect upon the child, the parents, and the community at large, and in the great material saving to the state which the substitution of probation for imprisonment has brought about, nevertheless it is in no sense a cure-all. Failures will result from probation, just as they have resulted from imprisonment. As Judge Lindsey has said:<sup>3</sup>

"It does not pretend to do all the work necessary to correct children or to prevent crime. It is offered as a method far superior to that of the old criminal court system of dealing with the thing rather than the child. That method was more or less brutal. The juvenile court system has a danger in becoming one of leniency, but as between this method and that of the criminal court, it is much to be preferred. But the dangers of leniency as well as those of brutality can be avoided in most cases. Juvenile-court workers must not be sentimentalists any more than brutalists. In short, the idea is a system of probation work, which contemplates coöperation with the child, the home, the school, the neighborhood, the church, and the business man in its interests and that of the state. Its purpose is to help all it can, and to hurt as little as it can; it seeks to build character — to make

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<sup>1</sup> 99 Pac. 333 (1909).

<sup>2</sup> 99 Pac. 278 (1909).

<sup>3</sup> Juvenile Court Laws Pamphlet, 23.

good citizens rather than useless criminals. The state is thus helping itself as well as the child, for the good of the child is the good of the state."

But more than this, the work of the juvenile court is, at the best, palliative, curative. The more important, indeed the vital thing, is to prevent the children from reaching that condition in which they have to be dealt with in any court, and we are not doing our duty to the children of to-day, the men and women of to-morrow, when we neglect to destroy the evils that are leading them into careers of delinquency, when we fail not merely to uproot the wrong, but to implant in place of it the positive good. It is to a study of the underlying causes of juvenile delinquency and to a realization of these preventive and positive measures that the trained professional men of the United States, following the splendid lead of many of their European brethren, should give some thought and some care. The work demands the united and aroused efforts of the whole community, bent on keeping children from becoming criminals, determined that those who are treading the downward path shall be halted and led back.

In a word, as was well said<sup>1</sup> in the course of the debates on the Children's Bill in the House of Commons:

"We want to say to the child that if the world or the world's law has not been his friend in the past, it shall be now. We say that it is the duty of this Parliament and that this Parliament is determined to lift, if possible and rescue him, to shut the prison door, and to open the door of hope."

*Julian W. Mack.*

CHICAGO, ILL.

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<sup>1</sup> 186 Hans. Parl. Deb., 4th series, 1262.



## THE JURORS AND THE JUDGE.

IT is stated, by a learned and accomplished writer, in a book designed for the ethical culture of the bar,<sup>1</sup> that a lawyer is under a moral duty to "support and maintain the court in its proper province wherever it comes in conflict with the coördinate tribunal — the jury." And then, to clinch the argument, the author tells us in scholastic Latin: *ad questiones juris respondeat iudices, — ad questiones facti juratores.*<sup>2</sup> In further support of his proposition he reminds us, that, in a multitude of cases, it has been uniformly held that verdicts against the charge of the court with respect to the law, will be set aside without limitation as to the number of times and without regard to the question whether the direction was right or wrong.

The merits of the ethical proposition thus stated may, for the purposes of this essay, be taken as confessed, but the maxim reciting the respective functions of judge and jury opens a wide and inviting field for the legal student.

The maxim, in its earlier form, seems to have been couched in the negative; that is, that the judges should not answer questions of fact nor the jury questions of law,<sup>3</sup> and, as a statement of legal doctrine, it seems to be very ancient. Yet we know that juries *do* answer questions of law, and that, in criminal prosecutions, they have done this for a time whereof the memory of man runneth not to the contrary. Indeed, this doctrine, that juries in the trial of state offences have the right to resolve both the law and the facts by their general verdict, has received the support of the most eminent lawyers on both sides of the Atlantic, and is still considered by many as one of the safeguards of civil liberty. It would seem, therefore, in order to avoid a palpable anomaly, that we should qualify our maxim by excepting from its operation the criminal jurisdiction, and this, in fact, is what modern writers do; but the old form has no exception, nor do the old legists seem to have considered that there was any. Let us direct our atten-

<sup>1</sup> Sharswood, Legal Ethics, 69.

<sup>2</sup> I venture a free translation as follows: All questions of law must be answered by the judges, all questions of fact by the jurors.

<sup>3</sup> The old books give it in this wise: *ad questionem facti non respondent iudices, ad questionem legis non respondent juratores.*

tion to this phase of our subject and follow the lines that seem to lead to it.

Of the origin and early history of juries but little is known with certainty, and much that has been said and written respecting them is pure conjecture. While it may be true that the ancient practice of compurgation by friends, or the inquest by sworn recognitors, are the seeds from which the jury developed, it is equally true that neither of these old forms bear any resemblance to the jury as we know it and as it has long been known in our system of legal procedure. Nor can we discern any real evidence of the existence of juries, in the proper sense of the term, prior to the reign of Henry II. It is generally conceded by legal scholars that the Assize of Novel Disseizin, which was instituted by the last named monarch about the year 1177 in order to avoid the wager of battle, is the first true step to jury trials. This gave to a tenant, on a suit for the recovery of lands, in case he did not wish to risk the combat, an alternative of putting himself on the assize; that is, of having the issue tried by four knights summoned by the sheriff and twelve others selected by themselves, all constituting the sixteen recognitors by whose verdict the cause was determined.<sup>1</sup> But it was not until considerable time thereafter that criminal charges became a subject for inquest by juries. The ancient privilege of compurgation by the oaths of friends, "the manifest fountain of unblushing perjury," was abolished during the reign of Henry II. The old ordeals of fire, water, etc., were the methods of defense then generally resorted to, and these methods continued to be employed until in the fourth Lateran Council they were abolished by the Church.<sup>2</sup> This left only the combat. But the combat was available only when a prosecutor came forward to demand it, and so it became necessary to find a substitute for the forbidden ordeals. A variety of expedients were resorted to until finally, during the reign of Henry III, an inquest by a jury came to be a permissible procedure.

It will thus be seen, that, contrary to popular belief, the jury was first impanelled to try the issues in civil causes, and that it was not for a considerable time after its use for this purpose had been established

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<sup>1</sup> See Hallam, *Middle Ages*, vol. ii, p. 386; 3 *Black. Com.* c. 10; Palgrave, *English Commonwealth*, c. 8; Pol. and M., *Hist. Eng. Law*, vol. i, p. 152.

<sup>2</sup> This event occurred in 1215. The formal abolition of ordeals in England was effected in 1218.



that it was employed in criminal procedure. The jury of Magna Charta, whatever else it may have been, was certainly not the institution which developed during the reign of Henry III, and which constitutes an alleged "bulwark" at the present day. And even the early juries just described only remotely resembled the institution now called by that name. They rendered their verdicts wholly upon the testimony of their own number or upon their own knowledge of the subject-matter of the litigation. Nor does it appear that witnesses were summoned, or that other testimony was received in open court, prior to the reign of Edward III. But about the middle of the fifteenth century the jury, much as we now know it, seems to have become an integral part of the King's courts,<sup>1</sup> and from this time on we have a fair knowledge of its history and functional development.

From what little information we possess concerning the ancient methods of procedure it would seem that in the earlier stages of development, and after the jury had passed from the condition of witnesses to that of triers, the whole matter in controversy was heard and passed upon without the observance of any practical distinction between the law and the facts of the case. During those early years the transactions of the people, requiring legal adjustment, were few and easily understood, while the procedure of the courts, conforming to the rude simplicity of the times, was summary and unartificial. The inquiry was permitted to assume any form that seemed best suited to the exigencies of the particular case and any and all kinds of evidence might be received. But after a time, when, by the progress of civilization, courts assumed a more regular form and controversies became more difficult and complicated, settled rules were established, until finally, during the reign of Henry IV, all evidence was required to be given in open court under the scrutiny of the presiding judge, who was at liberty to admit or exclude it according as its competency or incompetency might appear. From this period we may date the commencement of the modern law of evidence, the examination of witnesses, and the effective work of counsel in the trial of causes.

The rights and duties of jurors changed from time to time with the changes in the character of their office and the development of legal

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<sup>1</sup> Fortescue, writing soon after 1450, gives a very vivid picture of the jury of that day and describes it much as we know it at the present time. See *De Laud. Leg. Ang.*, c. 26.

procedure. Originally, being themselves witnesses, they were liable to attain for a false verdict, and this liability continued long after the reasons which first occasioned it had ceased to exist. For many years — centuries in fact — there was no mode of relief against an erroneous verdict except by the process of attain. When this was resorted to the case was practically re-tried by a jury of twenty-four and if the verdict was found to be false it was set aside and the jury punished.<sup>1</sup> This falsity, however, might be found in the decision of the law as well as the facts involved in their verdict,<sup>2</sup> nor were they protected from an attain by following the instructions of the judges in regard to the law, if the instructions turned out to be erroneous.<sup>3</sup> On the other hand, if the jury disregarded the directions of the judge, they were not liable to attain if they determined the matter of law correctly.<sup>4</sup> But while the jury were thus responsible for any error of law in their general verdict, and consequently had the right to determine it in conformity to their own judgment, yet they might obtain relief against a possible attain by finding the facts by a special verdict, and, in this way, place upon the record a question of law to be answered by the judges. This they were allowed to do at common law,<sup>5</sup> but because the judges, in some instances, would compel them to return a general verdict, thus subjecting them to the chances of attain, a statute for their relief was enacted during the reign of Edward I,<sup>6</sup> whereby the privilege of finding a special verdict was confirmed.

But while the jury were thus relieved of the duty of deciding the whole issue, including the legal questions involved, they were not prohibited from so doing. They might still resolve every question if they were willing to assume the risk of attain. Thus, in the language of the statute, "if they, of their own accord, are willing to say that is a

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<sup>1</sup> The punishment seems to have been extremely severe. The jury lost all of their legal freedom, became infamous, and forfeited their goods to the king. Their wives and children were evicted, their houses razed to the ground, their fields destroyed, their bodies cast into prison, and the injured party, against whom the false verdict was given, was restored to his former position. This sentence was ameliorated during the reign of Henry VIII, but as the jurors ceased to be witnesses attain gradually became obsolete, although it was not formally abolished until 1825.

<sup>2</sup> *Medler's Case*, Hobart, 227.

<sup>3</sup> *Bushell's Case*, Vaughn, 145.

<sup>4</sup> *Paramore's Case*, Dyer, 301.

<sup>5</sup> *Dowman's Case*, 9 Coke, 12.

<sup>6</sup> Stat. Westminster 2, passed in the year 1285.



disseisin or not, their verdict shall be admitted at their own peril." And this was the rule for many years. Littleton, writing two hundred years after the Act of Westminster 2d, fully recognized the right of jurors, by their general verdict, to determine the law in the issue tried by them,<sup>1</sup> and when Coke published his Institutes in 1628 it would seem to have been well understood that the province of the judges did not extend to the determination of legal questions which arose incidentally out of an issue of fact, but that for their proper decision the jury alone was responsible.

In time, however, mainly by the introduction of special pleading, it became customary to withdraw questions of law from the jury and place them upon the record for determination by the court. Thus, if the pleadings ended in demurrer, an issue of law was raised for the decision of the judges.<sup>2</sup> On the other hand, if they terminated in an issue to the country, it was required to be resolved by the jury. So, too, any question appearing on the record by motion was to be adjudged by the court. In this manner the boundaries of the respective provinces of judges and juries finally came to be marked and distinguished. That is, by the character of the questions which were thus placed upon the record. Nor does it seem that either branch of the triers was allowed to invade the province of the other, and the right of the jury to determine the whole issue committed to them is believed to have been as perfect as that of the judges to decide the issues that were referred to the court. Here, then, we find an explanation of the maxim which constitutes the text of this essay. It had reference to the questions which appeared upon the record, and to these only. The ancient meaning of it was, that the questions of fact thus raised should not be answered by the judges, nor the questions of law by the jurors. But this was its full extent. The doctrine, that questions of law which might incidentally arise in the determination of an issue of fact could be separated from the fact and left to the

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<sup>1</sup> See Lit. Ten. § 368.

<sup>2</sup> One of the primary objects of special pleading was to separate the law from the facts for the purpose of submitting the former to the judgment of the court and of leaving the latter to be determined by the jury. If the defendant could not deny the facts on which the suit was founded he was compelled to place his defense upon the record by special plea, and when such was the case the pleading usually ended in demurrer, forming an issue of law for the decision of the court. It is said that under the ancient practice, in the old actions of debt, detinue, covenant, trespass and replevin, a large portion of the questions arising in suits were thus withdrawn from the action of the jury and submitted to the judges for determination.

decision of the court, otherwise than by a demurrer to the evidence or the finding of a special verdict, was wholly unknown. This doctrine, familiar as it now is to us, is yet of comparatively recent origin and has grown out of the modern practice of granting new trials for a difference of opinion between the court and the jury upon questions of law arising on the trial. The first instance of the exercise of this power is in the year 1665. Prior to that time, as the jurors were under no legal responsibility to the judges for the correctness of their decisions, either as to the law or the facts of the case, it follows that they might properly exercise their own discretion in arriving at determinations, and the maxim applied only to the questions of law and fact as they stood upon the record.

But when motions for new trials came to be substituted for the ancient process of attain, and courts began to set aside verdicts because of a disregard of the opinions of the judge respecting the questions of law involved in the issue, then both judges and juries assumed new relations and the old maxim received a new content. The court having acquired power to revise the decisions of juries, and to order new trials for their neglect or refusal to follow the directions of the judge with respect to matters of law, it became the duty of the jury to comply with such instructions as might be given to them. But, while the boundaries of the respective provinces of judge and jury underwent a marked change, the maxim remained unaltered. As no change was necessary, none was made. It adapted itself perfectly to the new order of things and its binding force and effect was unimpaired. And now, even as in the days of old, in all civil cases questions of law must be answered by the judges; questions of fact by the jurors.

In state trials, however, we still find the jurors exercising their ancient prerogative of resolving both the law and the facts by their general verdict. Why, it may be asked, should there exist this striking difference between the civil and the criminal jurisdiction? In defense of the practice, it has been said, that it is not only in consonance with the true principle of the common law but is peculiarly applicable to a free government where it is advisable that the people should retain in their own hands a large measure of the administration of justice. The exercise of this power, by jurors selected from among themselves, it is urged, furnishes the most effectual security against the possible exercise of arbitrary power by the judges as well



as the best protection of innocence.<sup>1</sup> But this view, however commendable it may seem, does not furnish a satisfactory answer to our question, and for its proper solution we must again refer to the historical development of the jury.

From the earliest glimpse that we are able to obtain of jury trials in criminal actions it appears that the jury had the right to determine, according to their own judgment, the whole issue submitted to them on the general plea of not guilty. That is, they had the right of passing upon the criminality of the fact, as well as upon the fact itself. And this they might do without fear, for attaint lay only in civil cases, it being inconsistent with the spirit of the English constitution to question an acquittal in a criminal proceeding.<sup>2</sup> So, too, the forms of special pleading in civil actions, whereby questions of law were separated from the facts, were never extended to criminal prosecutions. The accused was never compelled to take his defense from the jury and submit it to the court by special justification, but might always put himself on the country for his general deliverance, and after a verdict of not guilty, however much the court might disapprove, it had no power to award a new trial. It was from these reasons, therefore, that the ancient prerogatives of the jury remained intact and to them also must we refer many of the present day doctrines respecting state trials. And it is because of these reasons that our maxim can have no application in criminal proceedings.

The underlying motive that prevented the adoption in criminal prosecutions of the rules of pleading which prevailed in civil actions was undoubtedly a solicitude for the safety of the subject, for, as Blackstone says, "in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown in suits between the king and subjects, than in disputes between one individual and another to settle the metes and boundaries of private property."<sup>3</sup> Many times have attempts been made by the English judges to encroach upon the rights of jurors in state trials, and to compel them to return verdicts in conformity with directions given. Upon more than one occasion have jurors been fined and imprisoned for a refusal to follow the instructions of the judges.<sup>4</sup> But always have these attempts been stubbornly resisted

<sup>1</sup> *State v. Wilkinson*, 2 Vt. 480.

<sup>2</sup> *Reg. v. Duncan*, 7 Q. B. D. 198.

<sup>3</sup> 4 Black. Com. 349.

<sup>4</sup> One of the earliest efforts of this kind was in the case of Sir Nicholas Throckmorton, who was tried for high treason and found not guilty against the charge of the

and the conflict between the crown, as represented by its judges, and the people, as represented by the jury, forms one of the most interesting chapters in the long struggle for constitutional liberty. It was not until 1670, however, that the right was finally established in the celebrated "Bushell's Case."<sup>1</sup> This grew out of the trial of William Penn and William Mead, for a breach of the peace in addressing a number of persons congregated on one of the streets of London. The court charged the jury strongly against the prisoners, but the jury, disregarding the charge, returned a verdict of not guilty. Thereupon they were immediately fined and committed to prison. Bushell, one of the jurors, refused to obtain a release by paying the fine, and brought a writ of *habeas corpus*. Upon the hearing the court vindicated the right of the jury to determine both the law and the fact by their general verdict, and since this time, until very recent years, the right has been unquestioned.

The independence of juries, thus declared by the judgment in Bushell's Case, became and remained the law of the American colonies and of the states subsequently erected upon them. The principle was embodied in the constitutions of many states, or declared by statutory enactments in others, and the earlier decisions all recognize the right.<sup>2</sup> This power of juries was also a favorite doctrine of the jurists.<sup>3</sup> Indeed, it was not until the year 1835 that a contrary doctrine was announced, when Judge Story held that the jury must follow the instructions of the court in making up their verdict.<sup>4</sup> This holding was followed by the Supreme Court of Massachusetts,<sup>5</sup> and afterward by the courts of some other states. The theory upon which the decision of Judge Story proceeded was, the unfitness of jurors to decide questions of law, and the violation of the harmony of the legal system which the admission of such right occasioned. This has also been the key-note of all subsequent arguments against the exercise of the right. The theory, it will be seen, wholly excludes

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court. Before the jury separated they were sent to prison, where they remained several months and from which they were released only after the payment of enormous fines. This occurred in 1554, but instances of the same kind are shown to have happened as late as 1670.

<sup>1</sup> Vaughan's R. 135.

<sup>2</sup> Wharton's State Trials, 88.

<sup>3</sup> See Wilson's Works, vol. ii, p. 215 *et seq.* (Andrew's ed.), for an interesting and instructive discussion.

<sup>4</sup> United States v. Battiste, 2 Sum. 240.

<sup>5</sup> Commonwealth v. Porter, 10 Met. 263.



the old ideas relative to juries as conservators of the liberty of the citizen and protectors of innocence against the consequences of the partiality and undue bias of judges. In support of this position it is contended that the causes which, in England, rendered the maintenance of the ancient right of juries indispensable to individual safety do not exist in this country, or, at best, operate with but slight force. Hence, it is said, the reason of the right having failed, the right itself should also cease. These views, of late years, have obtained a comparatively wide adherence, and, in the absence of constitutional or statutory recognition of the right, the volume of authority now seems to sustain the doctrine that the jury are not judges of the law in criminal cases.<sup>1</sup>

In many of the states, however, the old rule remains intact. In such states, while it is the duty of the court to aid the jury by instructing them upon all matters of law necessary for a proper determination of the issue,<sup>2</sup> yet the instructions so given do not bind the consciences of the jurors<sup>3</sup> but are regarded merely as an aid in arriving at a correct judgment.<sup>4</sup> At most, it would seem that the jury should give to the instructions a respectful consideration, especially where they are in doubt as to what the law may be,<sup>5</sup> but they may apply the law to the facts of the case according to their own conviction.<sup>6</sup>

*George W. Warvelle.*

CHICAGO, ILL.

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<sup>1</sup> *State v. Burpee*, 65 Vt. 1, and cases cited.

<sup>2</sup> *State v. Syphrett*, 27 S. C. 29.

<sup>3</sup> *State v. Armstrong*, 106 Mo. 395.

<sup>4</sup> *State v. Zimmerman*, 31 Kan. 85.

<sup>5</sup> *Bird v. State*, 107 Ind. 154.

<sup>6</sup> *Hooper v. State*, 52 Ga. 607; *Kane v. Commonwealth*, 89 Pa. St. 522; *State v. Whitmore*, 53 Kan. 343; *Spies v. People*, 122 Ill. 1; *State v. Lindsey*, 19 Nev. 47.

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Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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Second year . . .	169	193	202	190	196	201
First year . . .	218	232	241	229	228	293
Specials . . . .	58	51	58	59	49	60
	<u>548</u>	<u>610</u>	<u>646</u>	<u>628</u>	<u>640</u>	<u>738</u>
	1904-05	1905-06	1906-07	1907-08	1908-09	1909-10
Res. Grad. . . .	1	1	—	2	—	—
Third year . . .	182	192	190	171	169	187
Second year . . .	232	216	199	198	207	191
First year . . .	285	243	243	280	244	311
Specials . . . .	58	64	62	63	64	70
	<u>758</u>	<u>716</u>	<u>694</u>	<u>714</u>	<u>684</u>	<u>759</u>

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts: —

Class of	HARVARD GRADUATES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90
1908	39	5	27	71
1909	30	6	29	65
1910	46	9	38	93
1911	35	5	18	58
1912	36	10	28	74



GRADUATES OF OTHER COLLEGES.				
Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1901	27	22	59	108
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154
1908	19	33	96	148
1909	30	24	98	152
1910	25	27	101	153
1911	26	29	104	159
1912	38	33	150	221

HOLDING NO DEGREE.					
Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285
1908	14	1	9	24	243
1909	11	3	12	26	243
1910	15	1	18	34	280
1911	12	1	14	27	244
1912	7	2	7	16	311

As the sixteen Harvard seniors in the first year class have in each instance completed the work required for the A. B. degree, all members of the class are virtually college graduates. The same is true of practically the entire School. Of the seventy special students, twenty-three have entered this year, and of these nineteen are graduates of a college or university, three are graduates of law schools, and one is a non-graduate.

One hundred and twenty-four colleges and universities have representatives now in the School as compared with one hundred and twenty last year and one hundred and twenty-one the previous year. In the first-year class eighty colleges and universities, as compared with sixty-six last year, are represented, as follows: Harvard, 90; Yale, 24; Princeton, 20; Brown, 19; Williams, 16; Dartmouth, 14; Amherst, 8; Boston, Bowdoin, 6; California, Cornell College, Cornell University, Holy Cross, Michigan, 4; Monmouth, Oberlin, 3; Alabama, Augustana, Carleton, Columbia, Detroit, Georgia, Lake Forest, Minnesota, Mississippi, Missouri, North Dakota, Notre Dame, Oregon, Rock Hill, Texas, Trinity (Conn.), Washington and Jefferson, Wesleyan, 2; Allegheny, Brigham Young, Buchtel, Central, City College (N. Y.), Colby, DePauw, Drury, Emporia, Fairmount, Fargo, Fisk, Florida, Georgetown College, Gustavus Adolphus, Hamilton, Indiana, Iowa College, Johns Hopkins, Knox, Lafayette, Lehigh, Stanford, McKendree, Loyola, McMinnville, Mt. Allison, University of Nebraska, Nebraska Wesleyan, North Carolina, Northwestern, Ohio, Parsons, Pennsylvania College, University of Pennsylvania, Randolph-Macon, Rutgers, St. Lawrence, Tufts, Upper Iowa, Utah, Vanderbilt, Vermont, Virginia Military Institute, Wabash, Wisconsin, 1.

JURISDICTION OVER CHOSSES IN ACTION. — The jurisdiction of equity is always *in personam*, except in those cases where statutes have given jurisdiction *in rem*. But no statute can confer jurisdiction *in rem* over property beyond the territorial limits of the legislative power. Where the owner of a chose in action is a non-resident, and the debtor is domiciled within the state, the courts have claimed jurisdiction on the ground that the *situs* of the debt is with the debtor. If a chose in action can have a *situs* at all, the domicile of the debtor will naturally be chosen for that purpose, since the debt must there be enforced. And it has been thus held in cases involving administration<sup>1</sup> and garnishment.<sup>2</sup> On the other hand, the *situs* of the debt is for many purposes said to be the domicile of the creditor, in accordance with the maxim: "*mobilia personam sequuntur*." This has been so determined for purposes of taxation,<sup>3</sup> distribution of the assets of an intestate,<sup>4</sup> discharge of insolvent debtors,<sup>5</sup> and, by some courts, for the purpose of garnishment.<sup>6</sup> So too, the validity of an assignment is governed by the law of the place where it is made.<sup>7</sup>

It therefore appears that the so-called *situs* of a debt shifts to suit the convenience of the court. Rights are not predicated upon the *situs*; rather, the *situs* depends on the rights. The truth apparently is that a chose in action, being incorporeal, can have no real *situs*.<sup>8</sup> Jurisdiction must, therefore, depend on control over the parties. On principle, then, it would seem necessary to secure personal jurisdiction over a non-resident creditor in order to garnish a debtor; for otherwise the decree, being neither against the person nor the property of the creditor, is void as made without due process.<sup>9</sup> But the law may be taken as settled that control over the garnishee alone confers jurisdiction.<sup>10</sup> Under either view, however, jurisdiction over the person of the creditor allows the chose in action to be taken by equitable execution.<sup>11</sup>

<sup>1</sup> Wyman v. Halstead, 109 U. S. 654; Att'y-Gen'l v. N. Y. Breweries Co., [1898] 1 Q. B. 205. But a bond is assets where found. Beers v. Shannon, 73 N. Y. 292. See also Epping v. Robinson, 21 Fla. 36.

<sup>2</sup> Mooney v. Railroad Co., 60 Iowa, 346; Mason v. Beebe, 44 Fed. 556.

<sup>3</sup> State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300. *In re Bronson's Estate*, 150 N. Y. 1.

<sup>4</sup> Lowndes v. Cooch, 87 Md. 478. This accords with the usual rule of distribution in case of all personality wherever situated. See 14 Cyc. 21. *Cf.* Murphy v. Crouse, 135 Cal. 14.

<sup>5</sup> Baldwin v. Hale, 1 Wall. (U. S.) 223, 233; Bank v. Batcheller, 151 Mass. 589. And see Cole v. Cunningham, 133 U. S. 107, 115.

<sup>6</sup> Central Trust Co. v. Ry., 68 Fed. 685; Louisville & Nashville Ry. v. Nash, 118 Ala. 477. See, however, a very recent case, Planter's, etc., Co. v. Waller, 49 So. 89 (Ala.), which greatly restricts the doctrine of Louisville & Nashville Ry. v. Nash, *supra*.

<sup>7</sup> Van Wyck v. Read, 43 Fed. 716; Glover v. Wells, 40 Ill. App. 350. But this is subject to the limitation that such assignment will not violate the settled policy of the debtor's domicile. Davis v. Mills, 99 Fed. 39. And in the case of stock the law of the state which incorporated governs the validity of the assignment. Masury v. Bank, 87 Fed. 381.

<sup>8</sup> Mooney v. Buford & George Mfg. Co., 72 Fed. 32; Lancashire Insur. Co. v. Corbett, 62 Ill. App. 236; Hardware Co. v. Lang, 127 Mo. 242.

<sup>9</sup> Blackstone v. Miller, 188 U. S. 189, 206; Maher v. Insur. Co., 127 N. Y. 452.

<sup>10</sup> The jurisdiction of the state being generally conceded, its decree will be binding on any other state. Hence the garnishee could not be compelled to pay twice, unless he fails in his duty to notify his creditor of the garnishment. Harris v. Balk, 198 U. S. 215; Chic. R. I. & P. Ry. v. Sturm, 174 U. S. 710; Morgan v. Neville, 74 Pa. St. 52.

<sup>11</sup> See Ames, Cases on Trusts, 2 ed., p. 444.



A practical objection to the law as settled on this point arises where the chose in action is represented by marketable securities. To allow garnishment or attachment by service on the debtor alone would impair the marketability of the documents. Accordingly it has been suggested that in such cases the *locus* of the documents should determine the *situs* of the debt.<sup>12</sup> But this distinction does not commend itself. The document, it is true, is a valuable *res*, but the debt remains enforceable only at the debtor's domicile; hence the reason for fixing the *situs* of the debt at the debtor's domicile is not affected. However, the state in which the documents are found has jurisdiction *in rem*, so that control over the documents is thus virtually a control over the debt.

There are, however, at least two instances where the courts of the debtor's domicile rightly exercise jurisdiction without control of the creditor's person. In both, the connection of the state with the creation of the obligation has been intimate. Thus a state rendering a judgment undoubtedly has jurisdiction over the judgment debt.<sup>13</sup> So, too, a state, having control over the relations between a corporation which it has created and the stockholders, has the sole right to determine questions of stock ownership raised by dispute as to the validity of a transfer,<sup>14</sup> or as to which one of two claimants shall vote certain shares. Thus a court of equity has been rightly held to have jurisdiction to declare a trust of certain shares, the legal ownership of which was in a non-resident holder, but the beneficial interest in which was claimed by the corporation issuing them. *Amparo Mining Co. v. Fidelity Trust Co.*, 73 Atl. 249 (N. J., Ct. App.).

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POWER OF THE INTERSTATE COMMERCE COMMISSION TO FIX A RATE ON THE PRINCIPLE OF EQUALIZING ADVANTAGES. — By the Hepburn Act of 1906, amending the Interstate Commerce Act, power was given to the Interstate Commerce Commission "to determine what will be the just and reasonable rate or rates to be thereafter observed . . . as the maximum to be charged."<sup>1</sup> Although this section has been the object of much discussion by legal writers and economists, it has as yet come before the courts in very few instances. In the recent case of *Chicago, Rock Island & Pacific Ry. Co. v. Interstate Commerce Commission*, 171 Fed. 680 (Circ. Ct., N. D. Ill.), the court placed a very important limitation upon the power of the Commission under the section quoted. A base rate had been ordered from the Atlantic seaboard to Missouri River cities, which was lower than the sum of the rates from the seaboard to the Mississippi and from the Mississippi to the Missouri River cities. In the view taken by the court the Commission's sole purpose in making this rate was more nearly to equalize, in certain competitive territory, the advantage possessed by cities of the Middle West over the Missouri River cities, by reason of their location.<sup>2</sup>

<sup>12</sup> See Dicey, *Conf. of Laws*, 1 Am. ed. pp. 319-320. Cf. *Plimpton v. Bigelow*, 93 N. Y. 592; *Bank v. Mather*, 60 Minn. 362.

<sup>13</sup> *Renier v. Hurlbut*, 81 Wis. 24.

<sup>14</sup> *Masury v. Arkansas Bank*, 87 Fed. 381; *Hammond v. Hastings*, 134 U. S. 401. But see *Kerr v. Urie*, 86 Md. 72.

<sup>1</sup> U. S. Comp. St. Supp. 1907, p. 900.

<sup>2</sup> In the 22d Annual Report of the Commission (1908), p. 23, this order is referred

It was held that the Commission was without power to make an order on such a basis, not because of any prohibitive provision in the Act, but merely because the majority of the court thought that Congress could never have intended the Commission to have such power. Conjecture as to the intent of the legislature which cannot be gathered from the words used is always a dangerous method of statutory construction.<sup>3</sup> But even though the intent of the legislature be looked into in this instance, as the principle of equalizing advantages (which is merely a phase of the principle of charging what the traffic will bear)<sup>4</sup> has been widely used by the railroads and has been an important factor in the development of the country,<sup>5</sup> it is extremely improbable that such a principle of rate making was not in the minds of the legislature when the Act was passed. In fact, section 3 of the Act is directed against abuse of its exercise by undue discrimination between localities.<sup>6</sup>

Nor is there any rule of law opposed to this theory of rate making. Members of the Commission have at times expressed opinions against it,<sup>7</sup> but rates adopting it are upheld by the courts.<sup>8</sup> Moreover, the argument that the power of making rates on this theory cannot safely be entrusted to private hands<sup>9</sup> does not apply to a rate made by the Commission. So that even if the courts have jurisdiction to review an order of the Commission based on a misconception of the law,<sup>10</sup> there would be no such jurisdiction in this case. Whether the principle of rate making under discussion is a sound one, is another question. Some writers, instead of condemning it, regard it, if properly applied, as the only practical system.<sup>11</sup> But the solution of the economic problem of devising a proper rate-making scheme should lie with the legislature rather than with the courts; and it has often been pointed out that the members of the Interstate Commerce Commission, in the performance of their function of fixing rates, are legislators.<sup>12</sup>

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PROMISES TO ANSWER FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER. — Under the English Statute of Frauds, which has been gen-

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to as an application of the rule that the through rate for the long haul should be less than the run of the locals for the two short hauls.

<sup>3</sup> 2 Sutherland, *Statutory Construction*, 2 ed., § 388.

<sup>4</sup> Beale & Wyman, *Rate Regulation*, § 486.

<sup>5</sup> Noyes' *American Railroad Rates*, p. 55.

<sup>6</sup> 3 U. S. Comp. St. 1901, p. 3155.

<sup>7</sup> Freight Bureau of the Cincinnati Chamber of Commerce *v.* Cincinnati, New Orleans & Texas Pacific Ry. Co., 7 Int. Com. Rep. 180; In the Matter of Export Rates from Points East and West of the Mississippi River, 8 Int. Com. Rep. 185.

<sup>8</sup> Texas & Pacific Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission *v.* Southern Ry. Co., 122 Fed. 800.

<sup>9</sup> See 20 HARV. L. REV. 521.

<sup>10</sup> This jurisdiction was taken in *Stickney v. Interstate Commerce Commission*, 164 Fed. 638; *Missouri, Kansas & Texas Ry. Co. v. Interstate Commerce Commission*, 164 Fed. 645. But the jurisdiction of the courts to review these orders, except on constitutional grounds, is doubtful. For a discussion of this question see 32 Nat. Corp. Rep. 877.

<sup>11</sup> Noyes' *American Railroad Rates*, p. 55.

<sup>12</sup> See *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479; *Interstate Commerce Commission v. Alabama Midland R. R. Co.*, 168 U. S. 144; *Southern Pacific Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779. But see 23 HARV. L. REV. 12.



erally re-enacted in the United States, a promise to answer for the debt, default, or miscarriage of another is required to be in writing.<sup>1</sup> From the multitude of decisions which have endeavored to define the nature of such a promise, commonly known as a guaranty, certain well-defined rules may be deduced. (1) The promise must be collateral to some liability on the part of a principal. Hence if the alleged principal is not or cannot become liable,<sup>2</sup> or if the primary obligation is extinguished or novated by force of the secondary promise,<sup>3</sup> there is no guaranty. (2) The default of the principal must be a condition precedent to the promisor's liability.<sup>4</sup> Where, therefore, the facts show that the absolute liability of the promisor was contemplated, the statute does not apply. It makes no difference that such absolute liability might be discharged on payment by some other obligor.<sup>5</sup> (3) The primary and secondary obligations must be co-extensive and of a similar nature. Accordingly, if they give rise to different causes of action, if the measure of damages is different, or if the default and liability respectively may occur at different times, there is no promise to answer for the debt of another.<sup>6</sup> (4) The promisor must have a right to be reimbursed by the primary obligee; otherwise the substance of guaranty is lacking.<sup>7</sup> So, whenever the promisor has received consideration from the primary obligor, as in the case of a promise for the benefit of the creditor, his oral promise should bind him.<sup>8</sup> This class of cases should be carefully distinguished from another in which, although all the elements of guaranty are present, the large majority of courts take the promise out of the Statute of Frauds, on the ground that some new benefit has passed from the creditor to the promisor.<sup>9</sup> This almost universal rule was recently followed in *Bank of Pike v. People's National Bank*, 188 N. Y. Supp. 641.

It is true that whenever some benefit moves to the promisor, there is less danger of the fraud against which the statute was directed. But a doctrine which excludes from the operation of the statute cases which clearly come within its language, must be recognized as creating an exception by judicial legislation.<sup>10</sup> And since some consideration is required for a guaranty, the mere presence of consideration cannot make absolute a promise endowed with all the requisites of a guaranty. The force of this argument is recognized at least to the extent of refusing, as the majority of the courts do, to bring within the exception to the statute cases where the benefit of the consideration moves to one other than the promisor.<sup>11</sup>

<sup>1</sup> Stat. 29 Charles II, chap. 3.

<sup>2</sup> Chapin v. Lapham, 20 Pick. (Mass.) 467; Mease v. Wagner, 1 McCord (S. C.) 395.

<sup>3</sup> Bird v. Gammon, 3 Bing. N. Cas 883; Palmetto Co. v. Anderson, 123 Ga. 798.

<sup>4</sup> Gibbs v. Blanchard, 15 Mich. 292; National Bank v. State Bank, 93 Ia. 650.

<sup>5</sup> Lakeman v. Mountstephen, 7 Eng. & Ir. App. 17. A promise to indemnify is for this reason held not to fall within the statute. Wildes v. Dudlow, L. R. 19 Eq. 198.

<sup>6</sup> Bushell v. Beavan, 1 Bing. N. Cas. 103; Tolman v. Rice, 164 Ill. 255; Dock v. Boyd, 93 Pa. 92.

<sup>7</sup> Lichty v. Moore, 38 Neb. 269; Hall v. Trust Co., 220 Pa. 485.

<sup>8</sup> Barker v. Bucklin, 2 Denio (N. Y.) 45; Botkin v. Land Co., 23 Ky. L. Rep. 1964.

<sup>9</sup> Sutton v. Grey, [1894] 1 Q. B. 285; Raabe v. Squier, 148 N. Y. 81. *Contra*, Dillaby v. Wilcox, 60 Conn. 71, 80; Fullam v. Adams, 37 Vt. 391. See also Byrd v. Hickman, 48 So. 669 (Ala.).

<sup>10</sup> Small v. Shaefer, 24 Md. 143; Davis v. Patrick, 141 U. S. 479.

<sup>11</sup> *Contra*, Davis v. Patrick, *supra*; Howell v. Harvey, 64 S. E. 249 (W. Va.).

But that the consideration inures to the benefit of the promisor should be no answer to the defense of the statute: its sole importance is as showing whether the parties contemplated an absolute or a collateral liability.<sup>12</sup> However, in requiring that the consideration move from the creditor and that it also be a benefit to the promisor, the courts are recognizing the elements of a quasi-contractual right. In the case to which the exception to the statute may be traced there is a suggestion of a quasi-contractual right, and in it, as in many of the later decisions, it is to be noticed that the amount of recovery in quasi-contract would have exactly equalled the amount recovered on the oral promise.<sup>13</sup> Yet even if it would have been considerably less than the recovery on the promise, full justice would nevertheless have been done by restricting the promisee to a recovery back of the benefit unconscionably retained by the promisor. In a number of decisions a tendency toward a stricter observance of the statute is noticeable.<sup>14</sup> And it is doubtful whether the courts will allow recovery on the oral promise in cases where the default for which the promise answers is considerably larger than the benefit acquired by the promisor.<sup>15</sup>

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THE DOCTRINE OF EQUITABLE ELECTION. — Broadly stated the doctrine of equitable election is that "he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it."<sup>1</sup> The typical application of this rule is where a testator purports to leave to B property belonging to A and in the same instrument gives property to A. Equity will put A to his election either to adopt the benefit received under the will, losing all claim to his own property left to B, or to take against the will, retaining such property.<sup>2</sup> In the latter case, though by the better authority the gift is not wholly forfeited,<sup>3</sup> equity will sequester the benefits received under the will, for the compensation of the disappointed donee.<sup>4</sup> But the party bound to elect is entitled to a bill to ascertain the relative values of the two gifts.<sup>5</sup> Originally derived from the civil law,<sup>6</sup> the doctrine is now applied to deeds as well as wills.<sup>7</sup> Its foundation is commonly said to be the intention of the maker of the instrument, in furtherance of which equity implies a condition to the valid gift.<sup>8</sup> To imply such a condition when the testator knowingly disposes of property belonging to one of the beneficiaries under the will, seems in truth to be carrying out his intent. But the fact that the doctrine applies with equal force when the property

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<sup>12</sup> See 4 HARV. L. REV. 290.

<sup>13</sup> *Williams v. Leper*, 3 Burr. 1886; *Wooten v. Wilcox*, 87 Ga. 474.

<sup>14</sup> *Cf. White v. Rintoul*, 108 N. Y. 222, 227; *Carleton v. Floyd*, 192 Mass. 204.

<sup>15</sup> *National Bank v. Smith*, 107 Wis. 574; *Lang v. Henry*, 54 N. H. 57, 61.

<sup>1</sup> 2 Jarman, Wills, 5 Am. ed., § 1.

<sup>2</sup> *Noys v. Mordaunt*, 2 Vern. 581. See 18 HARV. L. REV. 302.

<sup>3</sup> *Gretton v. Haward*, 1 Swanst. 409; *Van Dyke's Appeal*, 60 Pa. St. 481, 492. *Contra*, Sugden, Powers, 8 ed., § 576.

<sup>4</sup> *Gretton v. Haward*, *supra*; *Brown v. Brown*, 42 Minn. 270.

<sup>5</sup> See *Douglas v. Douglas*, L. R. 12 Eq. 617, 637.

<sup>6</sup> Story, Eq. Jur., 13 ed., § 1078.

<sup>7</sup> *Moore v. Butler*, 2 Sch. & Lef. 249, 266; *Barrier v. Kelly*, 82 Miss. 233.

<sup>8</sup> *Dillon v. Parker*, 1 Swanst. 359, note, 401.



is given under an erroneous belief of ownership,<sup>9</sup> goes to show that it is wholly independent of the testator's intention.<sup>10</sup> That it rests on the broad principle that he who seeks equity must do equity, seems therefore the preferable view.<sup>11</sup>

Two exceptions to the general rule have been recognized by the courts. The first is where a will, defectively executed as to lands belonging to the testator, contains a valid gift to the heir. Before the modern statutes this raised the question of an election by the heir between the legacy and the lands rightfully his by descent. When the devise of realty was inoperative because of the Statute of Frauds, it was uniformly held that the heir need not elect;<sup>12</sup> for the courts hesitated to accomplish indirectly, by compelling an election, a result which the Statute prevented the testators accomplishing directly; they therefore refused to look at the will for the purpose of raising an election. Like considerations were applicable where the will was ineffectual to dispose of after-acquired land; yet in such a case the heir was put to his election.<sup>13</sup> And in a situation possible at the present time as well as under early statutes, namely, where the devise was inoperative because the lands in question were situated in a foreign jurisdiction, a like result was reached.<sup>14</sup>

The second exception was made in the case of the will of an infant. Because of the testator's incapacity such an instrument, inoperative under the early law as to land, but valid as to a gift of personalty, was regarded as insufficient to put the heir to his election.<sup>15</sup> On the ground that there must always be personal competency, a leading writer brings within this exception the will of a married woman.<sup>16</sup> But his view finds little support.<sup>17</sup> However it may have been in former times, under modern statutes giving married women full power to acquire, hold, and dispose of property, there is no reason not to apply the general rule of election. Accordingly, where, under the English Married Women's Property Act,<sup>18</sup> a married woman bequeathed to a stranger property belonging to her husband, and in the same will left the husband an annuity from her separate estate, the husband was compelled to elect. *In re Harris*, 1909, 2 Ch. 206.

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#### THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS. — Congress having provided for the exercise of the judicial power of the

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<sup>9</sup> *Whistler v. Webster*, 2 Ves. Jr. 366; *Barrier v. Kelly*, *supra*.

<sup>10</sup> Haynes, *Outlines of Equity*, 5 ed., pp. 263, 265. The only intent necessary is merely an intent to dispose of property in fact not the testator's own. *Cooper v. Cooper*, 7 L. R. H. L. 53, 70; *Havens v. Sackett*, 15 N. Y. 365.

<sup>11</sup> *Peters v. Bain*, 133 U. S. 670, 695; 1 Pom. Eq. Jur., 3 ed., § 465.

<sup>12</sup> *Sheddon v. Goodrich*, 8 Ves. Jr. 481; *Melchor v. Burger*, 1 Dev. & B. (Eq.) 634. But if an express condition was attached to the gift of personalty the heir was compelled to elect. *Boughton v. Boughton*, 2 Ves. 12 (a distinction much criticized). See *Melchor v. Burger*, *supra*.

<sup>13</sup> *Thellusson v. Woodford*, 13 Ves. Jr. 209; *McElfresh v. Schley*, 2 Gill (Md.) 181. *Contra*, *City of Phila. v. Davis*, 1 Whart. (Pa.) 490.

<sup>14</sup> *Brodie v. Barry*, 2 Ves. & B. 127; *Van Dyke's Appeal*, *supra*.

<sup>15</sup> *Hearle v. Greenbank*, 1 Ves. 208.

<sup>16</sup> 2 Jarman, Wills, 5 Am. ed., § 9.

<sup>17</sup> *In re Burgh Lawson*, 34 W. R. 39. But see *Coutts v. Acworth*, L. R. 9 Eq. 519. In *Rich v. Cockell*, 9 Ves. Jr. 369, often cited for this view, the point is left undecided. See also *Blaklock v. Grindle*, L. R. 7 Eq. 215, 219.

<sup>18</sup> 45 & 46 Vict. c. 75, § 1 (1882).

United States over controversies between citizens of different states, without limitation as to the nature of the controversy,<sup>1</sup> the federal courts sitting within a state construe the constitution and statutes and interpret the common law of that state. To guarantee the supremacy of the sovereign state, the Judicature Act provides that the laws of the several states shall be regarded as rules of decision in the federal courts.<sup>2</sup> But, as this Act has been held not to include the laws of a state in the sense that precedents established by judicial decisions are laws,<sup>3</sup> the federal courts are not bound to follow the decisions of the state courts. Indeed, if they were so bound, the purpose of this jurisdiction, namely, to prevent a possible bias in the state courts against a citizen of another state, would be destroyed.

Nevertheless, the inconvenience of having two interpretations of the law in the same territory early led the federal courts to follow the decisions of the local courts.<sup>4</sup> And this practice might have become universal had not a later federal decision made an exception on grounds of expediency in regard to questions of commercial law.<sup>5</sup> As a result, two opposed and well-defined principles have been recognized by the federal courts as controlling their treatment of the decisions of state courts. Thus decisions by a state court which interpret the state constitution and statutes,<sup>6</sup> or constitute any rule of property,<sup>7</sup> or cover any matter of local regulation,<sup>8</sup> are accepted as binding. In such matters the federal courts will reverse their own decisions after a ruling by the local court;<sup>9</sup> the Supreme Court will follow a state decision made after the case has been decided in the circuit court;<sup>10</sup> and any undecided question will, if possible, be left to the state court.<sup>11</sup> On the other hand, state precedent is not controlling in matters of commercial<sup>12</sup> or general law.<sup>13</sup> So, in a recent case when a state court had interpreted a will differently from the circuit court, the decision of the state court was not followed when the case came again before the federal court on a second writ of error. *Messinger v. Anderson*, 171 Fed. 785 (C. C. A., Sixth Circ.). A further exception to the general policy of agreement with the state courts is well established; when a contract is made by a foreign citizen under a state statute which has been held constitutional by a decision subsequently overruled, the federal courts will follow the earlier view of the state court.<sup>14</sup> But this seems nothing more than an effective use of the discretion placed in the federal courts to prevent any injustice to foreign citizens.<sup>15</sup>

As a result, however, of the exercise of discretionary jurisdiction by the

<sup>1</sup> 18 U. S. Stat. L. 470.

<sup>2</sup> 1 U. S. Stat. L. 92.

<sup>3</sup> See 22 HARV. L. REV. 611.

<sup>4</sup> *Brown v. Van Braam*, 3 Dall. 344.

<sup>5</sup> *Swift v. Tyson*, 16 Pet. 1.

<sup>6</sup> *Fairfield v. County of Gallatin*, 100 U. S. 47; *Merchants Bank v. Pennsylvania*, 167 U. S. 462.

<sup>7</sup> *Suydam v. Williamson*, 24 How. 427.

<sup>8</sup> See *Burges v. Seligman*, 107 U. S. 20, 33.

<sup>9</sup> *Southern Ry. Co. v. North Carolina Corporation Comm.*, 99 Fed. 162.

<sup>10</sup> *Moore v. National Bank*, 104 U. S. 625.

<sup>11</sup> *Pelton v. National Bank*, 101 U. S. 143.

<sup>12</sup> *Swift v. Tyson*, *supra*.

<sup>13</sup> *Clarke v. Bever*, 139 U. S. 96, 117. As, for example, the interpretation of the fellow-servant doctrine. *Baltimore v. Ohio Ry. Co. v. Bough*, 149 U. S. 368.

<sup>14</sup> *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532.

<sup>15</sup> See 4 HARV. L. REV. 311, 8 *ibid.* 328. As to the right of a state court to alter its own decisions, see 22 HARV. L. REV. 182.



United States courts, the idea has been advanced that there is a federal common law.<sup>16</sup> But any such law would be exercised over the territory of the states, and in a given territory there can be but one law in existence at one time. That law, even though subject to alteration by two distinct sovereigns, as in this country where a federal statute changes the law of every state, must nevertheless be the law of the territory or state. And it is consequently the state law which the federal courts are interpreting.<sup>17</sup> That federal decisions are followed in disregard of state court decisions does not argue the existence of a federal common law, but is simply an illustration of the essential feature of the common as distinct from the civil law — the authority of precedent.

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MUTUAL EXCLUSIVENESS OF THE BUYER'S REMEDIES FOR BREACH OF WARRANTY IN SALES OF PERSONALTY. — It is almost universally recognized that for the sellers breach of warranty the buyer has two remedies: an action or counterclaim for damages on the contract,<sup>1</sup> and recoupment in a suit for the purchase price.<sup>2</sup> Rescission is also allowed by a number of States,<sup>3</sup> although denied by about an equal number<sup>4</sup> and by the English courts.<sup>5</sup> An interesting question is the consistency of these remedies. In a recent case in a jurisdiction where rescission is allowed, it was held that even under a code system of pleading a buyer cannot recover consequential damages when the case has been tried on the basis of rescission. *Houser & Haines Mfg. Co. v. McKay*, 101 Pac. 894 (Wash.). This decision goes on the ground that the remedies by rescission and by suit on the contract are inconsistent; and that therefore the doctrine of election allows the pursuit of one only.<sup>6</sup>

The doctrine of election of remedies is based not on strict estoppel but on a distinct principle of public policy which requires that a defendant shall not be subjected to two inconsistent actions when the plaintiff is amply protected by one.<sup>7</sup> It does not apply, however, where a prior suit has been brought in ignorance of material facts,<sup>8</sup> or has been defeated either because brought before accrual of the right of action,<sup>9</sup> or because incompatible with the facts of the case.<sup>10</sup> But two actions, properly brought, of which one relies upon the existence of a contract and the other upon its disaffirmance,

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<sup>16</sup> A federal common law was also supposedly established by certain regulations of interstate commerce. See 15 HARV. L. REV. 224.

<sup>17</sup> For a concurring view of this problem arising under the Australian Constitution, see Clarke, *Australian Constitutional Law*, p. 194.

<sup>1</sup> *Mondel v. Steel*, 8 M. & W. 858; *Underwood v. Wolf*, 131 Ill. 425.

<sup>2</sup> *Poulton v. Lattimore*, 9 B. & C. 259.

<sup>3</sup> *Bryant v. Isburgh*, 79 Mass. 607.

<sup>4</sup> *Freyman v. Knecht*, 78 Pa. 141.

<sup>5</sup> *Street v. Blay*, 2 B. & Ad. 456; 15 HARV. L. REV. 148; 14 *ibid.* 327. Rescission is not allowed by the Sales of Goods Act, § 53 (1).

<sup>6</sup> See *Thompson v. Howard*, 31 Mich. 309.

<sup>7</sup> See *Emma Silver Mining Co. (Ltd.) v. Emma Silver Mining Co. of N. Y.*, 7 Fed. 401, 419.

<sup>8</sup> *Goodger v. Finn*, 10 Mo. App. 226.

<sup>9</sup> *Edgewood Distilling Co. v. Shannon*, 60 Ark. 133.

<sup>10</sup> *McLaughlin v. Austin*, 104 Mich. 489.

are clearly inconsistent and both cannot be taken advantage of.<sup>11</sup> Thus a suit to judgment upon a written contract as executed bars the right to a reformation of the contract in equity on the ground of mistake.<sup>12</sup> Similarly, it is generally held that there can be no rescission for fraud after the contract has been affirmed by an action for deceit.<sup>13</sup> And the converse is also true.<sup>14</sup>

The basis of the buyer's relief by recoupment for breach of warranty is that, since he has not received what he contracted for, he should pay only the actual value to himself of what he has received. It is inherently similar to a recovery in quasi-contract,<sup>15</sup> and hence should be treated as a disaffirmance of the contract.<sup>16</sup> A leading English case allows an action on the contract after recoupment, on the ground that the buyer could receive no compensation for consequential damages by recoupment;<sup>17</sup> but the American cases to the contrary seem correct.<sup>18</sup> And the same reasoning would oppose recovery by both recoupment and rescission. Where, however, the consistency of the remedies of rescission and action on the contract is concerned, the proper course is not so clear. It has been argued that on principle the buyer should have the right to rescind the transfer of property without rescinding the contract.<sup>19</sup> No doubt the parties might so agree. But in the absence of such agreement the authorities support the decision in the principal case.<sup>20</sup> According to principles of contract law, the two remedies should be coexistent; but, probably because the remedy for breach of warranty was originally in tort,<sup>21</sup> the courts have never viewed the matter in this light. And in the Sales Act it is provided that "when the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted."<sup>22</sup> The argument relied upon in the dissenting opinion of the case under discussion, that under the Code a plaintiff may unite several causes of action arising out of the same transaction, is not sustainable. The Code removes the technical forms of action, but it does not purport to alter the substance of a party's rights.<sup>23</sup>

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BROKEN TRANSIT IN SALES OF PERSONALTY. — Lord Mansfield's opinion that the seller's right of stoppage *in transitu* lasts until actual corporal delivery to the buyer is no longer followed.<sup>1</sup> On the other hand, not every

<sup>11</sup> See *Johnson-Brinkman Commission Co. v. Mo. Pac. Ry. Co.*, 52 Mo. App. 407.

<sup>12</sup> *Thomas v. Joslyn*, 36 Minn. 1.

<sup>13</sup> *Kimball v. Cunningham*, 4 Mass. 502; see *Stuart v. Hayden*, 72 Fed. 402, 411. But see *Emma Silver Mining Co. (Ltd.) v. Emma Silver Mining Co. of N. Y.*, *supra*.

<sup>14</sup> *Farwell v. Myers*, 59 Mich. 179; but see *Cohoon v. Fisher*, 146 Ind. 583.

<sup>15</sup> See *Mondel v. Steel*, *supra*.

<sup>16</sup> *Williston, Sales*, § 612.

<sup>17</sup> *Mondel v. Steel*, *supra*.

<sup>18</sup> *Gilmore v. Williams*, 162 Mass. 351; *Berman v. Henry N. Clark Co.*, 194 Mass. 248.

<sup>19</sup> *Williston, Sales*, § 612.

<sup>20</sup> *Park v. Richardson & Boynton Co.*, 81 Wis. 399; *Mundt v. Simpkins*, 81 Neb. 1.

<sup>21</sup> See *Schuchardt v. Allens*, 1 Wall. 359, 368.

<sup>22</sup> *Sales Act*, § 69 (2). See *Williston, Sales*, § 604.

<sup>23</sup> See *Maxwell v. Farnam*, 7 How. Pr. 236; 7 *Encyc. Plead. & Prac.* 362, n.

<sup>1</sup> *Dixon v. Baldwin*, 5 East 175, 184.



constructive possession by the buyer will terminate the transit.<sup>2</sup> What kind of constructive possession is sufficient for that purpose, is a question frequently raised where the journey of the goods is made up of several stages, the forwarding being done by agents standing in a more or less close relation to the buyer. While the cases are not entirely reconcilable,<sup>3</sup> the principle underlying them seems properly to be, that delivery into the hands of an agent of the buyer, whose possession is for a purpose other than that of merely sending the goods on to a definite destination, will end the transit.<sup>4</sup> If, however, the agent's authority is simply to forward to a definite place, the goods continue in transit while in his hands. Such was the holding in a recent English case. *Kemp v. Ismay, Imrie & Co.*, 100 L. T. R. 996 (Eng., K. B. D.).

Thus the transit is at an end if the agent either is authorized to hold the goods subject to the buyer's orders,<sup>5</sup> or has discretion as to the choice of destination.<sup>6</sup> But his general authority is not decisive; for if, by instructions from the buyer despatched either before or after<sup>7</sup> the goods are *en route*, his authority at the time of receipt has been curtailed to that of sending the goods on a specific journey, he is but a link in the transit.<sup>8</sup> The question on principle is one of fact only: whether the agent was more than a mere way station or not. Hence, in the absence of a contract giving the seller a lien till the goods reach a specified place,<sup>9</sup> the seller's belief as to the destination of the goods is immaterial.<sup>10</sup> Nor does anything turn upon the seller's knowledge<sup>11</sup> or ignorance<sup>12</sup> of the ultimate destination of the goods, or on the fact that his contract was to deliver F. O. B. cars or vessel.<sup>13</sup>

It would seem, then, that the possession by the buyer necessary for termination of transit is not determined by ordinary doctrines as to constructive possession through an agent; and accordingly that receipt of the goods by railroads, forwarding companies, truckmen, purchasing agents, etc., whose possession is for general purposes conceded to be that of the buyer,<sup>14</sup> is not such possession as will end the transit unless it satisfies the test herein advanced.<sup>15</sup> Nor does the degree of control possessed by the buyer over

<sup>2</sup> *Bethell v. Clark*, 19 Q. B. D. 553; 20 Q. B. D. 615. See *Chandler v. Fulton*, 10 Tex. 2, 15.

<sup>3</sup> See *Williston, Sales*, § 530.

<sup>4</sup> *Cf. Bethell v. Clark*, 20 Q. B. D. 615, 617; 2 Kent Com. 544, 545; *Scott v. Grimes*, 48 Mo. App. 521, 525.

<sup>5</sup> *Dodson v. Wentworth*, 4 M. & G. 1080; *Becker v. Hallgarten*, 86 N. Y. 167. But *cf. Frame v. Oregon Liquor Co.*, 48 Or. 272.

<sup>6</sup> *Leeds v. Wright*, 3 B. & P. 320.

<sup>7</sup> *Harris v. Tenney*, 85 Tex. 254; *Half, Weiss & Co. v. Allyn & Co.*, 60 Tex. 278. See *Harris v. Pratt*, 17 N. Y. 249, 267. But see *Bethell v. Clark*, 20 Q. B. D. 615, 617.

<sup>8</sup> *Jackson v. Nichol*, 5 Bing. N. C. 508.

<sup>9</sup> *Ex parte Watson*, 5 Ch. D. 35.

<sup>10</sup> *Aguirre v. Parmelee*, 22 Conn. 473. *Cf. London, etc., R'y v. Bartlett*, 7 H. & N. 400. The language in many of the cases looks the other way. *Coates v. Railton*, 6 B. & C. 422; *Atkins v. Colby*, 20 N. H. 154.

<sup>11</sup> *Ex parte Miles*, 15 Q. B. D. 39.

<sup>12</sup> *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560; *Aguirre v. Parmelee*, *supra*. *Contra, Jobson v. Eppenheim & Co.*, 21 T. L. R. 468.

<sup>13</sup> *Re N. Y. House Furnishing Goods Co.*, 169 Fed. 612; *Berndtson v. Strang*, L. R. 4 Eq. 481.

<sup>14</sup> *Cusack v. Robinson*, 1 B. & S. 299. See *Guilford v. Smith*, 30 Vt. 49, 65.

<sup>15</sup> *Aguirre v. Parmelee*, *supra*; *Scott v. Grimes*, *supra*; *Scott v. Pettit*, 3 B. & P. 469; *Ex parte Barrow*, 6 Ch. D. 783.

his agent seem material; for the buyer's power to affect the journey of the goods is equally great whether the agent is a common carrier or the buyer's private forwarder.<sup>16</sup> Hence, where the buyer sends his own vessel or cart for the goods, it is difficult to see why the goods are not still in transit, though in the control and constructive possession of the buyer, if the servant's only authority on receipt is to convey them to a specified place. The authorities are, however, almost unanimous that if such an agent receives the goods for the purpose of making final delivery in person, the transit is thereupon ended.<sup>17</sup>

## RECENT CASES.

ACCOUNT — ACCOUNT STATED — PROMISSORY NOTES AS BASIS FOR ACCOUNT STATED. — The plaintiff held four overdue promissory notes made by the defendant. After calculating the interest, he stated to the defendant the total amount due. The defendant admitted that the amount was correct. *Held*, that the plaintiff cannot recover as for an account stated. *Jasper Trust Co. v. Lampkin*, 50 So. 337 (Ala.).

If a creditor states and a debtor admits that as a result of a past transaction a fixed sum is due, the court will imply a promise to pay such sum. If the debt is not liquidated, this promise is good consideration for the creditor's implied promise to accept the sum stated as payment, and the latter can bring an action on an account stated. The debt, if unliquidated, need not be for more than one item. *Knowles v. Michel*, 13 East 249. But there is no legal detriment in a promise to pay a liquidated debt; and since in the principal case the interest had only to be computed, the court properly considered the debt liquidated and denied recovery. The decision may also be supported by the rule that a specialty cannot be merged into an obligation of lesser dignity such as an account stated. *Young v. Hill*, 67 N. Y. 162. Since negotiable instruments may well be treated as commercial specialties this rule might properly be extended to them. But see *Higmore v. Primrose*, 5 M. & S. 65.

ADMIRALTY — CONTRACTS — MORTGAGEE'S RIGHT TO FREIGHT. — After coal was supplied to a vessel on the mortgagor's credit, the mortgagee took possession of the vessel. The freight money which was thereafter earned on the homeward voyage was paid into court and claimed by the parties who had supplied the coal. *Held*, that the freight money belongs to the mortgagee. *El Argentino*, 101 L. T. R. 80 (Prob. Div. Eng.).

When a mortgagee takes possession of a vessel, he becomes its owner and is entitled to its earnings, regardless of antecedent contract rights. *Keith v. Burrows*, 2 A. C. 636; *Pelayo v. Fox*, 9 Pa. St. 489. In England, it is settled that no materialman can have a lien. *Northcote v. Owners of the Henrich Björn*, 11 A. C. 270. Hence the principal case correctly decides that when title to the coal was transferred to the mortgagor the seller lost all interest therein. See *The Two Ellens*, 26 L. T. R. 1; *The Pacific*, Brown & L. 243. In America the same result should be reached if supplies are furnished in domestic ports; but not if furnished in foreign ports. See *The J. E. Rumbell*, 148 U. S. 1. For in the latter case, a lien

<sup>16</sup> London, etc., *R'y v. Bartlett*, *supra*; See *Whitehead v. Anderson*, 9 M. & W. 518, 534.

<sup>17</sup> *Schotsmans v. Lancashire, etc., R'y Co.*, L. R. 2 Ch. 332. *Contra*, *Newhall v. Vargas*, 13 Me. 93. See also *Merchant's, etc., Co. v. Phenix, etc., Co.*, 5 Ch. D. 205, 219.



attaches. *The Scotia*, 35 Fed. 907. And such liens have priority over a mortgagee's claim. *The H. C. Wahlberg*, 87 Fed. 361; *The Scotia*, *supra*; *The Guiding Star*, 9 Fed. 521. Freight money is subject to maritime liens. *The Andalina*, 12 P. D. 1; *The Brig Wexford*, 7 Fed. 674. And a maritime lien is not a mere debt against the owner of the vessel, but is a right *in rem*, enforceable against the ship itself. See *The John G. Stevens*, 170 U. S. 113. So even if the mortgagee's claim to freight be based not on a lien, but on his possession of the ship, it should be subject to the materialman's claim against the vessel. See *The Brig Wexford*, *supra*.

AGENCY — CREATION OF AGENCY — APPOINTMENT BY INFANT. — The plaintiffs, who were infants, made a contract through an authorized agent to buy land. The defendants refused to convey on the ground that the contract was void. *Held*, that the plaintiffs can recover damages. *Johannsson v. Gudmundson*, 11 West. L. Rep. 176 (Manitoba, Ct. App., June 14, 1909).

According to a great mass of authority, an infant is incapable of appointing an agent. *Doe d. Thomas v. Roberts*, 16 M. & W. 778; *Holden v. Curry*, 85 Wis. 504, 510. This rule is repugnant to the modern conception of an infant's powers, and seems to have grown out of the old test of the validity of the acts of an infant, which was whether they were beneficial or prejudicial to him. Warrants of attorney to confess judgment or convey land were considered necessarily prejudicial, so they were always said to be void, and the same thing came to be said of the appointment of agents for other purposes. But an exception to this rule was recognized in the appointment of an attorney to accept seisin, which was clearly beneficial. See *Zouch v. Parsons*, 3 Burr. 1794, 1804, 1808. In an increasing number of jurisdictions it is now held that the appointment of an agent by an infant for ordinary purposes is not void, but that acts of such an agent for the infant principal, like acts of the infant himself, are voidable at the option of the infant. *Whitney v. Dutch*, 14 Mass. 457; *Hardy v. Waters*, 38 Me. 450; *Coursolle v. Weyerhaeuser*, 69 Minn. 328. In following this view, the principal case seems sound.

BANKRUPTCY — DISCHARGE — SUBSEQUENT ACTION FOR FRAUD. — After the defendant had been adjudicated bankrupt, the plaintiff filed his claim for goods sold and delivered and received part payment thereon. Subsequent to the defendant's discharge, the plaintiff sued for the balance due, on the ground that the sale was induced by the defendant's fraudulent representations. *Held*, that he has not waived the right to recover for the defendant's fraud. *Standard Sewing Machine Co. v. Kattel*, 117 N. Y. Supp. 32 (App. Div.).

Under section 17 (2) of the Bankruptcy Act of 1898 as amended in 1903, it seems clear that a cause of action for deceit is not affected by a discharge in bankruptcy. See *Mackel v. Rochester*, 135 Fed. 904. So the question is whether the plaintiff had lost his right to sue for fraud by his election to prove his claim. To constitute an election, some decisive act in pursuit of one of two inconsistent remedies must be done with knowledge of the facts. *Pekin Plow Co. v. Wilson*, 66 Neb. 115. By the weight of authority, proving a claim with knowledge of the bankrupt's fraud is sufficient evidence of such election, if the remedies are inconsistent. *Standard Varnish Wks. v. Haydock*, 143 Fed. 318. But a suit for fraud is consistent with affirmation of the sale induced. *Glover v. Radford*, 120 Mich. 542. Some cases, however, hold that a judgment for the price is a bar to a subsequent action for the fraud. *Caylus v. New York, Kingston & Syracuse Railroad Co.*, 76 N. Y. 609. But these decisions result rather from an unwillingness to give two judgments for claims arising out of the same transaction than from any supposed election. In the principal case, only the value of the goods less payments already made was demanded, and any dividends received would undoubtedly go toward lessening the judgment. The decision, therefore, seems correct. A previous case in the same jurisdiction is in accord. *Maxwell v. Martin*, 130 N. Y. App. Div. 80.

**BANKRUPTCY — PROVABLE CLAIMS — ALIMONY.** — A was granted a judgment for alimony against B in North Dakota. Upon the basis of this judgment A got a judgment in New York against B. B later became bankrupt and obtained his discharge. *Held*, that recovery on the New York judgment is barred by B's discharge. 118 N. Y. Supp. 562 (Sur. Ct.).

Alimony is not a debt, but a duty of support owed by the husband to the wife, liquidated in terms of money for convenience only. Hence, by the weight of authority, it was not provable in bankruptcy proceedings even before the adoption of section 5 (2) in the Bankruptcy Act of 1903. *Welmoe v. Markoe*, 196 U. S. 68; *Lynde v. Lynde*, 181 U. S. 183. The recovery of a judgment for alimony, however, like the recovery of any other judgment, should not change the essential nature of the liability. See *Wisconsin v. Pellican Ins. Co.*, 127 U. S. 265. Courts will therefore look at the basis of a judgment given in their own jurisdiction to determine whether it is dischargeable. *Turner v. Turner*, 108 Fed. 785. Nor does the fact that suit can be brought on a judgment in another state alter the nature of the claim. See *Audubon v. Shufeldt*, 181 U. S. 575. Even in such a case, the courts will look at the character of the judgment. *Huntington v. Attrill*, 146 U. S. 657. See *Horner v. Spelman*, 78 Ill. 206. Merely by combining the above principles, the nature of a judgment based on the judgment of another state can be determined. And since the judgment in the principal case depended ultimately on liability for alimony, the decision seems erroneous.

**BILLS AND NOTES — OVERDUE PAPER — MATURITY UPON DEFAULT IN INTEREST.** — An action was brought by the indorsee against the maker of a promissory note which contained a provision that upon any default in the payment of interest the note was immediately to become due. The plaintiff purchased the note for value after such a default. *Held*, that the plaintiff took before maturity. *Gillette v. Hodge*, 170 Fed. 313 (C. C. A., Eighth Circ.).

A decision squarely opposed to that in the principal case suggests as a reason for the dearth of cases in point, the obviousness of the fact that when parties contract that a note shall become due at a certain time, it does so become due. *Hodge v. Wallace*, 129 Wis. 84. Cf. *Harrison Machine Works v. Reigor*, 64 Tex. 89. But the present decision follows an established rule of the federal courts. *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268. See *Neb. City Nat. Bank v. Neb. City Hydraulic Gas Light & Coke Co.*, 4 McCrary (U. S.) 319. And by the weight of authority such a provision in a note is regarded as permissive only, and inserted solely for the holder's benefit. See *Blakeslee v. Hoit*, 116 Ill. App. 83. Otherwise a defaulting debtor might take advantage of his own wrong, and deprive his creditor of a valuable investment. See *Cox v. Kille*, 50 N. J. Eq. 176. Where the payee has not enforced his rights under the provision, the statute of limitations is held to run, not from the first default in the payment of interest, but from the time otherwise specified for the maturity of the note. *Belloc v. Davis*, 38 Cal. 242. Were the provision self-operative, the payee could not set up a waiver of his rights thereunder, merely to remove the bar of the statute against himself.

**CARRIERS — BILLS OF LADING — DELIVERY TO CONSIGNEE WITHOUT PRESENTATION OF BILL.** — Freight was shipped on a "straight" bill of lading, containing the words "not negotiable or assignable." The carrier delivered the goods to the consignee, without asking for the bill. The consignor, for value, transferred the bill to a third person, who demanded delivery and sued the carrier for conversion. A statute made all bills of lading negotiable. *Held*, that the plaintiff cannot recover. *Bonds-Foster Lumber Co. v. Northern Pacific Ry. Co.*, 101 Pac. 877 (Wash.).

Any misdelivery of property by a carrier is a conversion. *Youle v. Harbottle*, 1 Peake 68. By giving a negotiable bill of lading, the carrier in effect contracts to deliver the goods to the holder of the bill. See *Commercial Bank v. Chicago, St. Paul, & Kansas City Ry. Co.*, 160 Ill. 401; *National Bank v. Atlanta &*



*Charlotte Air Line Ry. Co.*, 25 S. C. 216. So a railroad is liable for allowing any person other than the holder of the bill to take the goods; and furthermore must demand the surrender of the bill. *Forbes v. Boston & Lowell Railroad Co.*, 133 Mass. 154; *First National Bank v. Northern Pacific Ry. Co.*, 28 Wash. 439. But since the contract under a "straight" bill is to deliver to the consignee and to no other, the carrier is protected in delivering to him without requiring the bill. *Templeton v. Equitable M'f'g Co.*, 79 Ark. 456; *Forbes v. Boston & Lowell Railroad Co.*, *supra*; *Nashville, Chattanooga, & St. Louis Ry. Co. v. Grayson Bank*, 100 Tex. 17. The opposite view, that the possession of the bill and the right to the goods are always inseparable, seems too narrow. See *First National Bank v. The Northern Railroad*, 58 N. H. 203; *Barnum Grain Co. v. Great Northern Ry. Co.*, 102 Minn. 147. Upon the assumption that the statute in the principal case does not apply to bills marked "non-negotiable," the decision is correct. The same court, on a "straight" bill containing no mention of negotiability, held the carrier liable. *First National Bank v. Northern Pacific Ry. Co.*, *supra*. But as the last section of the statute provides that a bill of lading does not alter the obligations of carriers as defined in this chapter, "unless it is plainly inconsistent therewith," the two interpretations are harmonious and reasonable.

CONFLICT OF LAWS — JURISDICTION — SITUS OF CHOSE IN ACTION. — A New Jersey corporation claimed the beneficial interest in certain shares of its own stock, the legal ownership of which was in a non-resident upon whom no process had been served. *Held*, that the New Jersey Court of Chancery has jurisdiction to declare a trust of such shares. *Amparo Mining Co. v. Fidelity Trust Co.*, 73 Atl. 249 (N. J., Ct. App.). See notes p. 134.

CORPORATIONS — PROMOTERS — DISCLOSURE OF INTEREST TO DUMMY DIRECTORS. — The defendant and others, owners of certain parcels of property, formed a corporation, intending to sell such property to it at a profit and, as part of the general scheme, to offer stock for public subscription. When only forty shares of stock were issued, these being held by the defendants and their dummies, the contract to buy the property was entered into for the corporation by the directors who then comprised all the stockholders. Two months later one hundred and thirty thousand shares were issued to the vendors and twenty thousand to outside subscribers. Later, the corporation sued in equity to recover from the defendant his secret profits. *Held*, that the defendant is liable. *Old Dominion Copper, etc., Co. v. Bigelow*, 89 N. E. 193 (Mass.).

In a suit against an associate promoter involving substantially the same facts the United States Supreme Court recently reached an opposite conclusion. *Old Dominion Copper, etc., Co. v. Lewisohn*, 210 U. S. 206. Though distinguishing that case from the facts disclosed in the present record, the court in the main case apparently goes the length of holding that "there is a liability of the promoter to the corporation when further original subscribers to capital stock contemplated as an essential part of the scheme of promotion come in after the transaction complained of, even though that transaction is known to all the then stockholders, that is to say, to the promoters and their representatives." This holding represents what seems the better view, suggested in 22 HARV. L. REV. 48.

EQUITABLE ELECTION — ELECTION UNDER THE WILL OF A MARRIED WOMAN. — Under the English Married Women's Property Act a married woman bequeathed to a stranger a certain chattel belonging to her husband, and in the same will left her husband an annuity out of her separate estate. *Held*, that the husband is put to his election to take under the will, allowing the gift of his property to take effect, or to repudiate the gift to himself and assert his right to the chattel. *In re Harris*, 1909, 2 Ch. 206. See NOTES, p. 138.

EXECUTORS AND ADMINISTRATORS — APPOINTMENT AND TENURE OF OFFICE — EFFECT OF REVOCATION OF ADMINISTRATION. — A's executors proved his will in England, but overlooked assets in India. Representing that A had died intestate, C got administration in India and sold the assets there to a *bona fide* purchaser. On discovery of the fraud, this administration was revoked. *Held*, that the executors cannot recover the assets. *Craster v. Thomas*, 101 L. T. R. 66 (Eng., Ch. D., June 9, 1909).

In England, if a grant of administration is revoked because of the discovery of a will naming executors, acts previously done thereunder are void. For by force of the will, title to the deceased's goods vested in the executors from the time of the testator's death. *Ellis v. Ellis*, [1905] 1 Ch. 613. *Contra, Thompson v. Samson*, 64 Cal. 330. But if the discovered will names no executor, title vests in the probate court. Therefore good title could be conveyed under its first grant of administration. *Boxall v. Boxall*, 27 Ch. D. 220. In the principal case, the executors would have to get ancillary probate, or its equivalent, before they could sue to recover the assets in India; nevertheless it would seem that they have title to the assets before such probate. See *Atkins v. Smith*, 2 Atk. 63. *Cf. Roe v. Summerset*, 2 W. Bl. 692. Such being the case, the *bona fide* purchaser did not get the legal title. While the doctrine of the principal case is unsupported by English precedent and unaffected by the Indian statutes under which the case directly arises, it is in harmony with the prevalent American doctrine. For by the American cases the title of an executor or administrator to property is given by the court, whose authority must be had as a condition precedent to a suit for possession. *Cf. Dial v. Gary*, 14 S. C. 573.

FEDERAL COURTS — AUTHORITY OF STATE LAW — CONSTRUCTION OF WILL. — An action of ejectment turned upon the construction of a will. A state court of last resort gave to the will an interpretation different from that placed upon it by the federal court at an earlier trial. The case came again before the federal court on a second writ of error. *Held*, that the decision of the state court will not be followed. *Messinger v. Anderson*, 171 Fed. 785 (C. C. A., Sixth Circ.). See NOTES p. 139.

FEDERAL COURTS — JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP — SUIT AGAINST JOINT-STOCK COMPANY IN NAME OF ITS PRESIDENT. — Suit was brought in a federal court against a joint-stock company organized under a New York statute with the right to sue and be sued in the name of its president. The president, the only named defendant, was a citizen of Ohio, and the plaintiff, a citizen of Pennsylvania. *Held*, that the diversity of citizenship necessary to confer jurisdiction on the federal courts does not sufficiently appear. *Taylor v. Weir*, 42 N. Y. L. J. 93 (C. C. A., Third Circ., May, 1909).

The citizenship of one of several partners in the same state wherein an adverse party is a citizen will defeat federal jurisdiction over any suit to which the partnership is a party. Hence the citizenship of each of the partners must appear. *Chapman v. Barney*, 129 U. S. 677. A joint-stock company organized under the New York statute is not a corporation, but a partnership. *People, ex rel. Winchester v. Coleman*, 133 N. Y. 279. The question therefore is, whether the statutory provision that suits may be brought against the association in the name of its president makes his citizenship conclusive on the question of diversity. The citizenship of a trustee, or of a receiver of a corporation, is conclusive. *Goodnow v. Oakley*, 68 Ia. 25; *Brisenden v. Chamberlain*, 53 Fed. 307. But the domicile of a next friend suing for an infant, or of a sheriff suing on a forthcoming bond, is immaterial. *Dodd v. Ghiselin*, 27 Fed. 405; *Wade v. Wortsman*, 29 Fed. 754. The distinction seems to be between a mere formal party and one who has the legal title, or the substantial control of the property. In the principal case, the president fulfilled neither of these requirements; the statute provided that any judgment should bind only the property of the association. The decision, therefore, seems correct.



**INSANE PERSONS — ADJUDICATION OF INSANITY — LIABILITY FOR PARTNERSHIP DEBTS CONTRACTED AFTER FORMAL INQUISITION.** — Upon formal inquisition, a member of a partnership was found to have been a lunatic without lucid intervals for two years. The plaintiff sued the partner's administratrix for goods sold and delivered to the partnership. *Held*, that the plaintiff can recover on contracts made before but not on those made after the inquisition. *Vautier's Estate*, 66 Leg. Int. 418 (Pa., Dist. Ct., June 19, 1909).

An agent's authority is terminated by the insanity of his principal. *Davis v. Lane*, 10 N. H. 156. But the relation of partnership, being dependent on a continuing contract, is closer, and is not dissolved merely by reason of a partner's insanity. *Jurgens v. Ittman*, 47 La. Ann. 367. Hence recovery was properly allowed on the partnership contracts made before the inquisition. Yet total insanity is a ground upon which equity may decree a dissolution. *Sayer v. Bennet*, 1 Cox Ch. 107. And it has been held that an adjudication of insanity dissolves the partnership without the aid of equity. *Isler v. Baker*, 6 Humph. (Tenn.) 85. *Contra*, *Raymond v. Vaughn*, 128 Ill. 256. If the partnership is dissolved, it follows that third persons, even though not having actual notice, cannot hold the insane partner's estate on contracts of the firm made after the inquisition. For although in the case of an ordinary dissolution, a third person having no notice may hold any member of the partnership on grounds of estoppel, it is well established that notice is unnecessary when the dissolution is by operation of law. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176; *Eustis v. Bolles*, 146 Mass. 413.

**INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — BASIS OF FIXING RATES.** — *Held*, that the Interstate Commerce Commission has no power to fix a rate based on the principle of equalizing advantages between localities. *Chicago, Rock Island & Pacific Ry. Co. v. Interstate Commerce Commission*, 171 Fed. 680 (Circ. Ct., N. D. Ill.). See NOTES, p. 135.

**LANDLORD AND TENANT — TENANCIES FROM YEAR TO YEAR — UNPAID RENT FOR ONE PERIOD AS SEPARATE CLAIM.** — By holding over after a lease for five years, the defendant became tenant from year to year to the plaintiff. After rent for two years had become due, the plaintiff recovered judgment for one year's rent, and now sues for the rent of the other year. *Held*, that the former judgment is not a bar to this action. *Kennedy v. The City of New York*, 42 N. Y. L. J. 153 (N. Y., Ct. App., Oct. 5, 1909).

The court recognizes that if several claims arising from the same contract have accrued, judgment recovered on one will bar an action on the others. *Secor v. Sturgis*, 16 N. Y. 548. *Warren v. Comings*, 6 Cush. (Mass.) 103. It is said, however, that in a tenancy from year to year there is a re-letting at the commencement of each year, so that the claim for each year's rent is separate and entire. *Austin v. Strong*, 47 N. Y. 679; *Borman v. Sandgren*, 37 Ill. App. 160. This view is not universally accepted. In distraining for rent, a landlord may treat the whole period of the tenancy as a single term. *Sherwood v. Phillips*, 13 Wend. (N. Y.) 478. But see *Alexander v. Harris*, 4 Cranch (U. S.) 298. In England, it has been held that in an ordinary tenancy from year to year, each year is a prolongation of the original term, and that there is not a re-letting at the beginning of each year, though it is suggested that the rule might possibly be otherwise, where the tenancy arises by holding over. *Gandy v. Jubber*, 9 B. & S. 15. The rule against splitting up a single cause of action is salutary, in that it reduces litigation; and it is submitted that there would be no injustice in applying it in the principal case where the divisibility of the cause of action, if it exists, rests on a highly refined distinction.

**MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — DEFECTIVE CONDITION OF SCHOOL PLAYGROUND.** — The defendant county council, which had all the

rights and duties of a school board, negligently failed to keep a school playground in the condition required by statute. As a result, a school boy was injured. *Held*, that the defendants are liable. *Ching v. Surrey County Council*, 25 T. L. R. 702 (Eng., K. B. D., July 5, 1909).

At common law, a municipal corporation is not liable for damage caused by its negligence in the exercise of purely governmental functions. See *Folk v. City of Milwaukee*, 108 Wis. 359. It is well established that the maintenance of schools by local boards as agents of the state is a governmental function. *Freel v. Crawfordsville*, 142 Ind. 27. See *Hill v. City of Boston*, 122 Mass. 344. Therefore a municipal corporation has been held not liable at common law for injuries to a pupil caused by the defective condition of the school house and grounds. *Wixon v. City of Newport*, 13 R. I. 454; *Finch v. Toledo Board of Education*, 30 Ohio St. 37. The reason sometimes given is that the board is not empowered to expend money raised by taxation to meet such claims. *Ernst v. West Covington*, 116 Ky. 850. The fact that the corporation is performing a public service from which it receives no corporate benefit, likens the school system to a vast charity, and the public interest would be subverted by the diversion of the public school funds to private claims. See *Ford v. School District of Kendall Borough*, 121 Pa. St. 543. Therefore a private action cannot be brought for a breach of a municipal corporation's public duty to maintain a school, unless such action is expressly or impliedly authorized by statute. Cf. *Gibson v. Mayor, Aldermen & Burgesses of Preston*, [1870] L. R. 5 Q. B. 218. Such authorization does not appear in the statute in the principal case.

PATENTS — EQUITABLE EXECUTION ON PATENT RIGHTS. — The plaintiff obtained a judgment against the defendant, a non-resident, who held no tangible property within the jurisdiction. Upon failure of legal execution, the plaintiff applied for the appointment of a receiver, by way of equitable execution, to receive the profits of three English patents owned by the defendant and within the jurisdiction. No present income was being derived from the patents. *Held*, that no receiver can be appointed. *Edwards & Co. v. Picard*, 25 T. L. R. 815 (Eng., Ct. App., July 30, 1909).

It has been repeatedly held that a patent right is property, though on account of its incorporeal nature, not subject to seizure and sale at common law. *Peterson v. Sheriff of San Francisco*, 115 Cal. 211. But equity has power to order its assignment and sale for payment of the patentee's judgment debt. *Gillett v. Bate*, 86 N. Y. 87; *Pacific Bank v. Robinson*, 57 Cal. 520. And upon the patentee's failure to execute such assignment, it is proper for the court to appoint a suitable person as trustee to execute the same. *Ager v. Murray*, 105 U. S. 126. The same result is reached by the appointment of a receiver to dispose of the patent for the creditor's benefit. *Blanchard v. Cawthorne*, 4 Sim. 566; *Petition of Keach*, 14 R. I. 571. The principal case limits the subjection of a patent right to equitable execution to those instances where income is being derived therefrom. This seems unsound on principle as well as on authority. For it would allow the debtor, by leaving his patent unworked, to defeat the creditor, when a sale or license of the patent might yield enough to pay the judgment debt.

QUASI-CONTRACTS — RECOVERY FOR BENEFITS CONFERRED WITHOUT CONTRACT — MEASURE OF DAMAGES. — Acting on what both parties erroneously believed to be a contract, the plaintiff made improvements on the defendant's land. Owing to the defendant's lack of business judgment the increased value of the premises was less than the cost of the labor and materials expended. *Held*, that the plaintiff can recover the value of the labor and materials. *Vickery v. Ritchie*, 202 Mass. 247.

To prevent unjust enrichment, a plaintiff can recover on a *quantum meruit* what he deserves under all the circumstances of the case. Negligence or want of skill reduces his damages. *Ervin v. Epps*, 15 Rich. Law (S. C.) 223, 229. And



they may entirely bar recovery. *Farnsworth v. Garrard*, 1 Campb. 38. But lack of benefit to the defendant is not a defense, unless due to fault of the plaintiff. See *Edington v. Pickle*, 1 Sneed (Tenn.) 122, 127. Thus it appears that other important considerations would often be omitted, if the amount of the defendant's enrichment were used as the sole measure of damages. But see *Farnsworth v. Garrard*, *supra*. Where the plaintiff is not at fault, the great weight of American authority looks rather to the services rendered and the materials furnished, than to the benefit received by the defendant. Such is the rule if the defendant prevents performance of the contract. *Mooney v. York Iron Co.*, 82 Mich. 263. The same rule applies if work is done on express request. *Stowe v. Bultrick*, 125 Mass. 449. But see *Van Deusen v. Blum*, 35 Mass. 229. If the contract fails owing to mutual mistake, or lack of mutual assent, the rule is implied. *Buck v. Pond*, 126 Wis. 382. In the principal case, the fact that the defendant was enriched less than he might have been was due to his own fault, and should not affect the plaintiff's recovery.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — COVENANTOR'S LIABILITY UPON RE-ENTRY AFTER BREACH OF COVENANT BY LESSEE. — The defendant on buying an estate covenanted with the vendor, for himself and his assigns, to erect no other than private residences. He then granted a lease, taking covenants similar to his own. The lessees erected a building in violation of the covenant. They then became bankrupt, and upon their trustee's disclaimer of the lease the defendant re-entered. The rest of the vendor's estate with the benefit of the covenants was thereafter sold to the plaintiff. *Held*, that the plaintiff is not entitled to a mandatory decree to compel the removal of the building. *Powell v. Hemsley*, [1909] 2 Ch. 252.

The principal case seems to misunderstand the true grounds for equitable relief by way of mandatory decree. Such relief is granted on the theory that only by specific reparation can equity be done, when there has been a breach of such a covenant as would ordinarily allow specific performance. *Tucker v. Howard*, 128 Mass. 361. Specific reparation seems to connote a wrong already done, and the decree orders that the wrong be undone. *Atty.-General v. Algonquin Club*, 153 Mass. 447. And whether the plaintiff has suffered damage is immaterial. *Lord Manners v. Johnson*, 1 Ch. D. 673. See *Lloyd v. London, etc., Ry. Co.*, 2 DeG., J. & Sm. 568. The relief is granted on the ground that the defendant has broken his covenant, and must not be allowed unjustly to be enriched thereby. In equity the burden of such restrictive covenants binds all purchasers with notice. *Tulk v. Moxhay*, 2 Phillips 774. In the principal case, the defendant had notice of the restrictions and of his lessee's breach. Consequently when he acquired the latter's interest, he got no right to retain the benefit of the building wrongly erected. See *Bird v. Hall*, 30 Mich. 374; *Gaskin v. Balls*, 13 Ch. D. 324. The discussion by the court as to whether or not there was a continuing breach seems irrelevant, and it is submitted that the refusal of relief merely because the breach was completed before the purchase by the defendant was erroneous.

SALES — BREACH OF WARRANTY — BUYER'S REMEDIES MUTUALLY EXCLUSIVE. — The plaintiff sued for the purchase price of a harvesting machine. The defendant filed a counterclaim to recover, as having rescinded the contract, freight charges paid as part of the purchase price, and also consequential damages resulting from breach of warranty. The court instructed that in case of a preponderance of evidence in his favor, the defendant might recover both items so claimed. *Held*, that such an instruction is error. *Houser & Haines Mfg. Co. v. McKay*, 101 Pac. 894 (Wash.). See NOTES, p. 141.

SALES — CONDITIONAL SALES — RISK OF LOSS. — The plaintiff sold to the defendant a cash register, retaining title thereto as security for the payment of

the purchase price. After delivery of the register to the buyer, but before the maturity of the note, the register was accidentally destroyed. *Held*, that the plaintiff can recover on the note. *National Cash Register Co. v. South Bay Club House Association*, 64 N. Y. Misc. 125 (Sup. Ct.).

The present decision is the first in New York squarely placing the risk of loss in a conditional sale upon the buyer. See *Humeston v. Cherry*, 23 Hun (N. Y.) 141. *Contra*, *Wolf v. Di Lorenzo*, 21 N. Y. Misc. 521. For a discussion of the principles involved, see 9 HARV. L. REV. 106; 13 *ibid.* 608; 14 *ibid.* 626; 19 *ibid.* 388.

SALES — STOPPAGE IN TRANSITU — BROKEN TRANSIT. — A bought goods of B in the city of M, F. O. B. at M, to be marked "NXZ Adelaide," and sent to C at the city of L, for loading on ships. C was a forwarding agent, and had received orders from A to forward such goods by ship to Adelaide. Before the ship sailed, but after the goods had been loaded on board, A became bankrupt, and B served notice to stop *in transitu*. *Held*, that the notice is effective. *Kemp v. Ismay, Imrie & Co.*, 100 L. T. R. 996 (Eng., K. B. D. Mch. 29, 1909). See NOTES, p. 142.

SET-OFF AND COUNTERCLAIM — RECOUPMENT AGAINST CREDITOR'S ASSIGNEE. — A contractor assigned to the plaintiff his claim against the defendant for payment due under two building contracts. After the defendant had notice of the assignment, the assignor failed to complete the buildings. *Held*, that in an action by the plaintiff on the assigned claim, the defendant can recoup for the assignor's default. *American Bridge Co. of New York v. City of Boston*, 88 N. E. 1089 (Mass.).

The statutes of set-off do not allow a debtor to set off against his creditor's assignee a debt from the assignor which matured after notice of the assignment. *Watson v. Mid Wales Railway Co.*, L. R. 2 C. P. 593. After the ownership of the claim has by notice to the debtor vested in the assignee, a claim maturing against the assignor is no longer a debt from the owner of the principal claim. *Meyers v. Davis*, 22 N. Y. 489. *Cf. St. Andrew v. Manchaug Mfg. Co.*, 134 Mass. 42. Since counterclaim, too, is a cross action, the same rule is probably applicable. *Spencer v. Babcock*, 22 Barb. (N. Y.) 326. The better explanation of the common law remedy of recoupment is that the defendant attacks the plaintiff's cause of action by showing that he has failed in counter performance, wherefore the defendant need not perform his promise, but only compensate the plaintiff for what he has done. See *Mondel v. Steel*, 8 M. & W. 858. But see *Dushane v. Benedict*, 120 U. S. 630. *Cf. Basten v. Butler*, 7 East 479. Under this doctrine the principal case is sound. Against the assignee the debtor may well attack the validity of the contract sued on; for assignment cannot cure inherent weakness. *Ford v. White*, 16 Beav. 120.

SURETYSHIP — NATURE OF SURETYSHIP CONTRACT — GUARANTY. — The plaintiff bank agreed to rediscount certain notes made by customers of the defendant bank, in consideration whereof the defendant bank orally agreed to guarantee the payment of the notes at maturity. *Held*, that the plaintiff bank may recover on the promise. *Bank of Pike v. People's National Bank*, 118 N. Y. Supp. 641 (Sup. Ct.). See notes p. 136.

TRUSTS — CESTUI'S INTEREST IN THE RES — RIGHT OF CESTUI'S EXECUTOR TO UNEXPENDED INCOME OF SPENDTHRIFT TRUST. — The testatrix left personality to trustees to apply the income to the support and maintenance of her imbecile nephew and after his death to the trustees absolutely. *Held*, that the unexpended income goes to the trustees, and not to the *cestui's* administrator. *Ross's Estate*, 66 Leg. Int. 562 (Pa., Dist. Ct.).

At common law accumulated income became a part of the principal of the



trust estate, and, in the absence of any provision to the contrary, was distributed as such. *Huber's Appeal*, 80 Pa. St. 348. Since the decision establishing this rule in Pennsylvania, however, trusts for accumulation have been declared invalid in that jurisdiction. ACT OF APRIL 18, 1853. PA. LAWS, 507. Yet an accumulation to provide for contingencies within reasonable limits may be sustained. *Howell's Estate*, 180 Pa. 515. It is, then, a reasonable presumption that the testatrix did not intend to add to the principal fund by any accumulated income. So it seems to follow that she has not attempted to dispose of the income beyond its use for the nephew's benefit. The interest of the latter was that of *cestui* of a spendthrift trust. See *Broadway Nat. Bank v. Adams*, 133 Mass. 170. His sole right was to compel an execution of the trust and an application of the income to his use. *Scott v. Nevins*, 6 Duer (N. Y.) 672, 676. Consequently, since the *cestui* had a right to have the income applied to his use, and since the testator showed no intent otherwise to dispose of it, it is submitted that the claim of the *cestui's* administrator should have been allowed, as it was in another recent case in the same jurisdiction. *In re Waller's Estate*, 72 Atl. 1062 (Pa.).

TRUSTS — CREATION AND VALIDITY — TENTATIVE TRUSTS. — The deceased opened separate bank accounts in his own name, as trustee for his several children. Each child was informed of his account with the additions made to it thereafter, and told that the money would be at his disposal upon reaching majority. When the father died, he was still in possession of the bank books and the deposits stood intact, although the children had all attained majority. Held, that the trusts had become irrevocable before the father's death, and therefore are not subject to the transfer tax. *Matter of Pierce*, 132 N. Y. App. Div. 465.

The doctrine of "tentative trusts" seems to be peculiar to modern New York law. Whether a particular act is intended for a declaration of trust is normally a question of fact for a jury. *Merigan v. McGonigle*, 205 Pa. St. 321. An early New York case, however, held the mere fact of a deposit by A in trust for B conclusive of a trust. *Martin v. Funk*, 75 N. Y. 134. But in Massachusetts it was held that there could be no trust without notice to the *cestui que trust*. *Clark v. Clark*, 108 Mass. 522. The practice of fictitious trust accounts in savings banks led to a modification of the early New York rule, and the single fact of a deposit by A in trust for B is now held to constitute only a tentative trust, revocable by A at will. *Matter of Totten*, 179 N. Y. 112. If the trust remains unrevoked and unexplained at A's death, the trust is effectual. See *Cunningham v. Davenport*, 147 N. Y. 43, 47. Any facts showing an intent to give the *cestui que trust* a vested interest will make the trust irrevocable from the outset. *Farleigh v. Cadman*, 159 N. Y. 169. This doctrine carries out the real purpose of the depositor, and the result in the principal case seems sound.

TRUSTS — RIGHTS AND LIABILITIES OF THIRD PARTIES — LIABILITY FOR INDUCING BREACH OF TRUST. — By a contract of sale, the vendee agreed to pay the purchase price to the wife of the vendor. The defendant, a creditor of the vendor, wrongfully induced the vendee to make the payment to him. Thereafter the vendee became insolvent. Held, that the vendor's wife can recover from the defendant damages for procuring a breach of trust. *Grant v. Bacon*, 127 L. T. 299 (Eng., Margate County Ct.).

It is well settled that a person who, without legal justification, induces a promisor to break his contract, thereby renders himself liable in tort to the promisee. *Lumley v. Gye*, 2 E. & B. 216. This principle has been much extended. Thus a spiteful interference with a man's business relations is actionable though no breach of contract results. *Quinn v. Leathem*, [1901] A. C. 495. And a defendant has been held answerable in damages for inducing the plaintiff's husband to leave the state in order to avoid the payment of alimony. *Hoefler v. Hoefler*, 12 N. Y. App. Div. 84. Although there seem to be no adjudicated cases upon the tort liability which a defendant incurs by procuring another to commit a breach

of trust, the analogy between the trust relation and the contractual relation is so close that the present decision seems eminently sound upon this point. But it is probable that the facts of the case did not present a trust relation; for a mere beneficiary under a promise made to a third party is not a *cestui que trust*. *In re Rotherham Alum & Chemical Co.*, 25 Ch. D. 103.

UNFAIR COMPETITION — COMBINATIONS — SELF-INTEREST A JUSTIFICATION. — Aiming to build up its own business at the expense of a rival, the defendant exchange passed a resolution which forbade any member from doing brokerage business for an active member of the rival exchange, under penalty of suspension or expulsion. A member of the defendant exchange thereupon notified the plaintiff, a member of the rival exchange, that he could transact no further business for him. *Held*, that the plaintiff cannot enjoin the enforcement of the resolution. *Heim v. N. Y. Stock Exchange*, 118 N. Y. Supp. 591 (Sup. Ct.).

Two lines of decisions support the legality of the resolution involved in the principal case. The first hold that a voluntary combination refusing to do business with outsiders is not even *prima facie* tortious. *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 210. The second hold that although such combinations are *prima facie* tortious, they may frequently be justified by a proper motive, such as the desire for exclusive trade with customers. *Dunlap's Cable News Co. v. Stone*, 15 N. Y. Supp. 2. So, to obtain preferences in employment for members is sufficient justification. *National Fireproofing Co. v. Mason Builders' Assn.*, 169 Fed. 259. But if the object is solely to injure another, it is tortious. *Purington v. Hinchliff*, 219 Ill. 159, 166. In the principal case, the court properly found that the defendant's aim to build up its own business justified the resolution. The fact that a third party was thereby inconvenienced is immaterial. *National Protective Assn., etc. v. Cumming*, 170 N. Y. 315. As an active member of the rival exchange, however, the plaintiff could hardly claim even the neutrality of a third party. Had the resolution been enforced by heavy fines, it would have become coercive and a tort against the plaintiff. *Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110. The plaintiff would then have been entitled to an injunction. *Willcutt & Sons Co. v. Driscoll*, *supra*. The *dictum* to the contrary in the principal case seems unfortunate. But suspension or expulsion is not coercion. *Booth & Bro. v. Burgess*, 72 N. J. Eq. 181, 196. Indeed, such measures seem essential to the discipline of any organization.

## BOOK REVIEWS.

A TREATISE ON DAMAGES. By John D. Mayne. Eighth Edition. By Lumley Smith. London: Stevens and Haynes. 1909. pp. i, 766.

It is quite common to hear a law book referred to as the "leading" treatise on its subject; and the epithet is often more or less accurately applied. But no one can question it when applied to Mayne on Damages. That treatise occupies, in England, the place in the literature of damages occupied by Sedgwick in America. Published at first in 1856, a small volume of some three hundred and fifty pages, it has in fifty-four years passed through eight editions, the same number that Sedgwick has had in a little more than the same time. In his first edition, Mr. Mayne acknowledged his indebtedness to Sedgwick, but expressed the belief that there was still room for an English work. In this belief he seems to have been amply justified. At the start he attempted to collect all the English decisions; and to use American cases only when no English cases in point could be found; and in each edition since, the editors have aimed to collect all the English and Irish cases decided since the last previous edition. In each instance they express the belief that they have done so. No attempt has been made to collect American cases since the second edition, with the result that the eighth edition, a complete collection of English cases, required of the editor the consideration of some 3,800



cases as compared with 15,000 in the last edition of Sutherland on Damages. Mayne on Damages has increased in size steadily, but it is even now a small book compared with American treatises.

It is interesting to note that since the second edition, Judge Lumley Smith has been an editor. The second edition and the present one he edited alone; in the others he collaborated with the author. The fact that the editorial work throughout has been in the hands of the author and only one other editor, and he a well-trained lawyer, may account for the comparatively slight increase in bulk in the past thirty years. The plan and chapter arrangement have with one exception remained the same from the beginning. The present sixteenth chapter was added in the third edition.

In his preface to the present edition Judge Smith says that Mr. Mayne's forecasts have been justified by subsequent decisions in a very remarkable manner. Though true, it is perhaps not very remarkable after all, for when a book has been a classic for fifty years, the opinions of the author may well have moulded the law by furnishing the basis of the decisions of courts.

From what has been said it may be seen that the work would not be useful to American lawyers as a compendium or digest of cases, but as an analysis and statement of law on topics of general, rather than local application, such as the rule of *Hadley v. Baxendale* and of *Dulieu v. White*, and others of similar kind, it is of great value.

S. H. E. F.

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THE LAW OF PERSONAL INJURIES ON RAILROADS. By Edward J. White. In two volumes. St. Louis: The F. H. Thomas Law Book Company. 1909. pp. clxiii, 826; xxxviii, 827-1739.

In his work covering the large field of personal injuries on railroads Mr. White has made two large divisions, to each of which he has allotted one volume. The first volume bears the title *Injuries to Employees*, and the second volume is called *Injuries to Passengers, Licensees, and Trespassers*.

In the first volume, before the rights of employees are set forth, the author devotes several chapters to the general law of torts and to the practice and procedure in railway accident cases, including such matters as the jurisdiction, the parties to an action for death, evidence, issues for the court and for the jury, and damages. These subdivisions are made in such a manner that the practitioner should be able to find the point at which his question is treated with very little effort. In general these prefatory subjects are treated as fully as can be expected in a book which is essentially given up to the rights of the parties. It is, perhaps, to be regretted that a little more space and consideration is not given to the questions of the conflict of laws, since it is so difficult to find problems of that sort dealt with in detail in any of the digests. Also it is to be regretted that the question of the allowance of punitive damages is covered without protest against the theory of the award of such damages. The main subject of injuries to employees is taken up in great detail, and frequent subheadings illustrating the questions that arise are explained by numerous examples in the decisions of the courts. The author is a strong advocate of the common-law rule as to the liability of the employer for injuries resulting from the negligence of co-employees and condemns modern statutes abrogating the rule and the motive which gives rise to the passage of such statutes. These statutes are given in detail and the decisions thereunder discussed.

The second volume covers the general relation of common carriers and passengers and the duties of the former to the latter, with the liability of the common carrier to the passenger for injuries arising from the acts of employees, of fellow passengers and of strangers. The rights of licensees and trespassers are also taken up in detail. The duties and liabilities of the carrier are divided in relation to the place where the injury may occur and the source of the injury and to the position of the person injured at the time of its occurrence. Thus the liability for injuries arising from defects in roadbed and track, stations and ap-

proaches, equipment, and the operation of trains are separate topics, as are also injuries incurred in boarding and alighting from trains, at grade crossings, overhead crossings and subways, those due to failure to give signals, provide gates or watchmen, etc. The defense of contributory negligence is taken up in relation to each class of persons whose rights are discussed and that of imputed negligence is not overlooked.

The whole field of tort actions against railroads is covered by this work in much detail and a great number of cases digested. The minuteness of the subdivisions causes some repetition which would be needless in a book intended for the use of students, but which adds to the value of the work for the practitioner, since it saves the time otherwise spent in separating the cases involving the same doctrine on different facts from those more directly in point in the specific instance for which a case is sought — a task especially frequent in the field of tort actions. The peculiar nature of the subject is, perhaps, also sufficient reason for the infrequency of an expression of opinion on the part of the author. With the exception of a few instances such as the topic of injuries arising from the acts of co-employees, the author has confined himself to the compiling of the decisions on all phases of the problems of railway accident cases. A clear index, a full table of cases, and complete references to the different reporter systems and reports in the citations, with the careful grouping of the decisions seem sufficient to make the book of great value as a special digest for the practitioner whose practice includes railroad accident cases.

J. S. S.

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A TREATISE ON THE LAW OF LANDLORD AND TENANT. By H. C. Underhill. In two volumes. Chicago: T. H. Flood and Company. 1909. pp. ccxxxiv, 670; 671-1467. 8vo.

The subject of landlord and tenant is in a field of the law already well occupied, notably by Taylor, whose work has now reached its ninth edition — clear evidence of its merit and authority — by McAdams, Jones and others. Some justification for entering this field is, therefore, to be expected. Recognizing this, the author gives as one reason for his undertaking, that greater prominence to the relation of landlord and tenant as a contractual relation should be given and more of the law of contract should be incorporated in a work on the subject. It would seem, however, from an examination of other treatises, that the fact that tenancy is created by a contract, expressed or implied, has been duly developed. Rather is the author's justification to be found in his full collection of the latest American and English decisions and his comprehensive treatment of the modern law created by them.

In the first volume the principal topics are: parties to the lease, execution, different kinds of tenancy, what contracts are leases, rent and covenants. The author devotes the second volume principally to the tenant's possession and use of the premises, the respective rights and obligations as to condition of premises, duties to repair, taxes and insurance, assignment, eviction, surrender, fixtures and lien for rent and advances. His style is uniformly clear and direct. The rule of law is succinctly stated and numerous illustrations of its application are given under different facts and situations. Where the authorities are in conflict the different rules are indicated in the text and the cases discussed in the footnotes. The author does not give a full discussion of principles and this may account for his lack of discrimination in the case of *Lyon v. Reed* (page 1199), which is cited for the proposition that there is a surrender by operation of law "when another estate is created by the reversioner or remainderman with the assent of the tenant or which is incompatible with the existing state or term." While the decision did, in fact, recognize the above statement as law, it held that the principle did not apply where reversions or incorporeal hereditaments compose the subject matter of the surrender and where there has been no open shifting of possession. But in proportion to the whole, this oversight is slight. Generally the



work shows accuracy, clearness and fulness of statement. The treatment of the subject of landlord's lien for rent or advances, the negligence of the landlord in general, and the reciprocal rights and obligations of the parties to leases of separate flats or floors in dwelling houses alone makes the book a valuable one for the practitioner. The well arranged index adds to its usefulness, but its appearance is somewhat marred by some typographical errors.

R. T. H.

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A TREATISE ON THE LAW OF REAL PROPERTY. By Alfred G. Reeves. In two volumes. Boston: Little, Brown and Company. 1909. pp. cxxiv, 788; pp. v. 788-1588. 8vo.

This work cannot be justified on the ground that there is a pressing demand for any more literature on the general subject with which it deals. As an effort, however, to set forth clearly and concisely for the benefit of the student or lay reader a general outline of the fundamental principles that underlie our modern law of real property, the book will fill a real want. The author has shown excellent discretion in limiting his treatment of the subject. Particular stress is laid on the influence of political and social history on the development of our modern law of real property; and the discussion of the growth and decline of the feudal system is especially interesting.

The arrangement of the book is good and the text simple and clear. The classification of vested remainders under four heads tends to clarify the fine but important distinction between vested and contingent remainders, and is an example of similar treatment of other difficult subjects. The citation of cases is very sparing and for this reason the work may not commend itself so highly to the practicing lawyer, but it clearly was not the intention of the author to compile a digest or burden his text with numerous quotations from decided cases, as some of the recent writers of modern text-books are wont to do. There is considerable reference to the law of New York in the footnotes, but the text is not made less valuable for the student on this account. Altogether the book is a work of real merit even though it cannot be said to be an exhaustive treatment of any branch of the subject.

S. ST. F. T.

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HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS. By Walter C. Tiffany. Second Edition by Roger W. Cooley. St. Paul: West Publishing Company, 1909. pp. xiii, 650.

The first edition of this book was admirably planned, and Mr. Cooley has wisely not departed from its arrangement. In fact, the few changes in the subject during the last thirteen years have, generally speaking, reduced his task to an incorporation of recent cases, with the exceptions of material additions to that part of the book dealing with the separate property of married women and the insertion of a section on the extraterritorial effect of divorce. Mr. Cooley's task, as he has outlined it, is, in the main, well done. Although the modern law of married women is largely based on statute, parts still remain untouched by legislation. The common law must constantly be referred to on questions of construction. And also every lawyer should be familiar with its development, because, where the common law of married women has not been altered by legislation, the statutes on the general subject or on other parts of it have had an indirect effect. The action of the legislature often has a "reflex action" on the future mental attitude of the judges. See Smith's Cases on Persons, p. 338. And, moreover, when a statute has removed the reason for a common law rule, does the maxim, "*Cessante ratione cessat ipsa lex*," apply? A large part of Mr. Tiffany's original plan consisted in stating so much of the legislation as had general application, with its interpretation by the courts. All this should be brought down to date. For these reasons the continuation of Mr. Tiffany's work on the law of married women is an absolute necessity. On the subject of infancy, which has not been generally

covered by statute, this necessity is even more apparent. The omissions here noticed are those of the first edition. *Hall v. Butterfield*, 59 N. H. 354, is not cited; nor is attention drawn other than by the mere citation of the case to the elaborate and valuable note to *Craig v. Van Bebber*, 18 Am. State Reports, 569. That note, occupying about one hundred and fifty pages, not only states exhaustively the law of infancy to 1890, but gives at length the writer's own acute comparisons and theories.

J. W.

DIGEST OF THE LAW OF TRUSTS. By W. G. Hart. London: The "Law Notes" Publishing Offices. 1909. pp. xxiv, 464.

In 1908 a bill embodying a code of trusts was introduced in the House of Commons and was referred to a committee, which after a careful sounding of professional opinion concluded that it was impossible to proceed with the bill. The drafter presents it in the above entitled volume, together with notes on which he based the bill. The book is offered as a text-book, but as such it is defective for the same reason for which the proposed bill appears impracticable, namely, that the bill codifies parts of the law of trusts which are clearly settled and therefore least need codifying. Points concerning which there is doubt are either treated rather scantily by the author in his notes or are altogether ignored. American authority is always referred to throughout the book by means of citations of Ames' Cases on Trusts; but the writer has failed in both code and notes to mention many matters which are treated by Dean Ames. Among these are the following: The doctrine of *Ex parte Pye*; the distinction of a trust from an assignment of a chose in action; the trust relation involved in bank collections; the relation of the law of uses to the modern law of trusts; the effect of forgiveness of a debt. The necessity of certainty of the *cestui* is not fully discussed, and in general the notes present no advance on the discussions contained in the standard text-books. The collection of authorities covers only English cases and those not fully.

The proposed code included several English statutes which have defined the duties of trustees, for instance as to investments. The author goes fully into these points, but this portion of the book could hardly be useful to the American trustee or counsel.

R. M. A.

SELECTED STATUTES OF THE STATE OF NEW YORK, as Amended to the Close of the Legislative Session of 1909. By Mathew Bender. Sixth Edition. Albany: Mathew Bender and Company. 1909. pp. v, 457.

THE FIXED LAW OF PATENTS, as established by the Supreme Court of the United States and the nine Circuit Courts of Appeals. By William Macomber. Boston: Little, Brown and Company. 1909. pp. cxlv, 925.

THE EFFECT OF WAR ON CONTRACTS, AND ON TRADING ASSOCIATIONS IN THE TERRITORIES OF BELLIGERENTS. By Coleman Phillipson. London: Stevens and Haynes. 1909. pp. 114.

CONSULAR CASES AND OPINIONS, from the Decisions of the English and American Courts and the opinions of the Attorneys General. By Ellery C. Stowell. Washington: John Byrne and Company. 1909. pp. xxxvi, 811.

INTERNATIONAL INCIDENTS, for Discussion in Conversation Classes. By L. Oppenheim. Cambridge: at the University Press; New York: G. P. Putnam's Sons. 1909. pp. xi, 129.

REPORT OF THE COMMITTEE ON ADMISSIONS OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION. 1909. pp. 24.

DRAWING WILLS AND THE SETTLEMENT OF ESTATES IN PENNSYLVANIA. By John Marshall Gest. Philadelphia: T. & J. W. Johnson Company. 1909. pp. xx, 152.

THE LAWS OF ENGLAND. By the Right Honorable the Earl of Halsbury and other lawyers. In about 20 volumes. Volume IX. London: Butterworth and Company; Rochester: Lawyers' Co-operative Publishing Company; Philadelphia: Cromarty Law Book Company. 1909. pp. clxxx, 794, 47.



# HARVARD LAW REVIEW.

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VOL. XXIII.

JANUARY, 1910.

No. 3.

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## OFFERS CALLING FOR A CONSIDERATION OTHER THAN A COUNTER PROMISE.

WHERE an offer contemplates a unilateral contract, situations may easily arise which, pressed to a logical conclusion, must result in admitted hardship. If there is no flaw in the logic, and no sound theory can be found which will admit of an exception to the apparently necessary result, we must admit that the law is defective in such a case. If that is the situation, legislation is called for, and if no remedial law is passed, the natural conclusion is, either that the cases are so infrequent as not to arouse public sentiment, or that the sense of justice of the community is not sufficiently aroused to insist upon legislative reform.

Legislation which aims to bring about a radical change in the substantive law has great possibilities of danger, as any well informed and thoughtful lawyer knows. If the profession can meet any specific difficulty by gradual change and without legislative aid, the self evolving spirit of our law is preserved, and better results obtained. The difficulty is that the safe, but sometimes extreme, conservatism of the well trained lawyer often impels him to oppose any argument or suggestion tending to broaden or modernize the existing rules of law.

No rule is more firmly embodied in our system of law than that involving the technical doctrine of consideration in contract. Yet the doctrine is crude and little adapted, in many respects, to our modern complex life. It should be modified and changed. In fact this is being done, as is shown by many judicial utterances. Fre-

quently these are illogical and poorly reasoned, indicating a failure fully to grasp the underlying principles, and yet often they manifest a sound instinct. It has been a remarked characteristic of our courts, both English and American, that many times they reach correct results by means of fallacious and inadequate reasoning. Such appears to be the situation as to the rule requiring a consideration for a simple promise. Indeed there seems to be a gradual but decided tendency towards reducing this purely technical and quite unnecessary<sup>1</sup> rule to the narrowest limits. This is seen not only in the decisions, but also in occasional discussions by scholarly writers who have a profound knowledge of their subject.<sup>2</sup>

Bearing this tendency in mind, the query arises whether there is any sound theory by which the possible harsh results of the rule in the case of proposed unilateral contracts can be eliminated. The present writer must admit in advance that he cannot suggest any theory which meets, to his own satisfaction, all cases, or which strikes him as unquestionably sound, even as to the situations to which it might apply. Perhaps, however, a review of some of the decisions, and also of hypothetical cases thrashed out in the classroom, may lead to suggestive thought on the part of some reader.

As simple contracts are based upon agreement, the offer may demand any consideration desired, in exchange for the proposed promise. Whether the offer calls for a counter promise, or some other consideration, is a question of fact in each case. If the offer calls for something other than a counter promise, it logically follows that such offer cannot become a promise until that which is required as a consideration has been furnished. Prior to this point there is no contract. It is not possible for the offeree to force a counter promise upon the offeror, because he does not desire or ask for a promise.

Suppose, for example, the following case:

A desires his safe moved from his old office to a new one. He asks B to do this act, and says he will pay him twenty-five dollars for it. When B has carried the safe to the door of the new building, A appears and tells B that he withdraws his offer, directing him to leave the safe there. Nevertheless B proceeds and places the safe in the

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<sup>1</sup> That it is unnecessary, is shown by the fact that European systems based upon the Roman law have no such requirement.

<sup>2</sup> See for example the interesting articles by Dean Ames, "Two Theories of Consideration." 12 HARV. L. REV. 515.



new office. Under such circumstances how can a contract be found, or how can A be held to any liability?

Or suppose another case:

A merchant is anxious to have a cartload of goods placed upon an outgoing steamer, and there is barely time to accomplish this. He asks a cartman to take the goods to the steamer, and offers twenty-five dollars for the act. The cartman loads the goods and proceeds towards the wharf. On the road another merchant hails him and offers one hundred dollars for the immediate cartage of his own goods. The cartman thereupon places the first merchant's goods in a safe place, and proceeds to carry the second load. As the cartman has never obligated himself to take the first load, he cannot be held liable for failure to perform the work, and the first merchant suffers his loss without remedy.

In each of these cases it is assumed as a fact that the offer calls for an act. But as in the safe case the offer is revoked before the consideration is furnished, that is, before the act requested is completed, and as in the cartage case the offeree voluntarily ceases performance of the act before completion, there can be no contract in either.

At first thought it may be suggested that in the safe case the offeror, by ordering the safe mover to drop the safe, waives the completion of the work. The conclusive answer is that the law demands consideration as an element of contract, and refuses to annex this obligation to the acts of the parties unless the requisite elements exist. There is no such thing as waiving a positive requirement of the law. Until the entire consideration is furnished there is nothing but an offer, which can always be withdrawn.

Again it may be said that as soon as the safe mover begins his work, he indicates his acceptance, a contract arises, and it is too late to withdraw. True, there is an acceptance, but the suggestion overlooks the fact that want of consideration is the difficulty, not want of agreement. This suggestion would meet the case of a proposed bilateral contract, but as the offer asks for an act, neither a counter promise nor anything else except the very thing demanded can be furnished as a consideration. Until the act is completed the consideration is not given.

It does not help the situation to suggest that part of the work has been done, and there is a readiness to do the rest, because until

the entire consideration is furnished there is merely an offer, which can therefore be withdrawn. As there is an offer, and the act is being done in exchange for the proposed promise, it is not possible to allow a recovery for the work done, on the theory of a *quantum meruit*, because that would be putting an obligation upon the offeror on the theory of an implied promise. Any such idea is distinctly negatived by the existence of the offer, and no implication is possible in view of the expressed intent of the offeror as shown under such circumstances. Continuing to move the safe, after the offer is revoked, accomplishes nothing, because there is no longer an offer to ripen into a promise.

If part performance has unjustly enriched the offeror, a recovery for such enrichment may be had in an action on the theory of quasi-contract. In the supposed case of the safe mover, however, there could be no such recovery. There is no increase of the offeror's estate and the rule as to unjust enrichment cannot be invoked. Indeed, there might actually be a loss to him, if he desired the safe returned to his old office.

The well known case of *Fitch v. Snedaker*<sup>1</sup> goes even further. A reward was offered for information leading to the arrest and conviction of a murderer. On the trial the plaintiffs offered to prove that before the offer was known to them they gave information which led to the arrest of the murderer. This evidence was excluded. They then offered to prove that with a view to the reward, they spent time and money, and made disclosures whereby a conviction was secured. This evidence was also excluded, and the direction of a nonsuit was sustained on appeal.

Here we have an offer unrevoked, an acceptance of that offer, and actual performance of the acts requested, but in spite of all this there was no contract. Giving information leading to arrest took place before the offer was known, hence there could be no acceptance at the time this part of the work was done. The acceptance took place after the arrest, and although information leading to the conviction was given pursuant to the offer, and in exchange for the proposed promise, yet this was not enough. Information leading to arrest as well as to conviction was requisite. The plaintiffs had actually furnished all that was asked, but as the first part was performed in ignorance of the offer, it could not have been given in

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<sup>1</sup> 38 N. Y. 248.



exchange therefor. When they knew of the offer it was too late. A part of the requested act had already been given, and hence could not be furnished afterwards as consideration. After acceptance only part of the consideration was given, and this was not enough. Such a conclusion is strictly logical, and no other seems possible, if legal principles are understood and followed.

In *Biggers v. Owen*<sup>1</sup> there was a similar offer of reward. The court held that until some one complied with the terms of the offer, it could be revoked.<sup>2</sup> In that case some work had been done pursuant to the offer, and one woman arrested but discharged.

In *Los Angeles, etc., Co. v. Wilshire*<sup>3</sup> the defendants gave an instrument purporting to be a promissory note payable to the order of the plaintiff, "thirty days after the completion of" the railway contemplated by the parties. This note, with several others, was given to a bank pursuant to an escrow agreement. By this agreement the notes were to be handed to the plaintiff on the completion of the road. The plaintiff spent money in obtaining the franchise and building the road. Before its completion defendants served notice on the plaintiff that they did not recognize any liability on account of said written instruments, because the road was not completed in time. The plaintiff continued the work, completed the road, and began an action. At the trial the plaintiff had judgment which was affirmed on appeal.

The court says:<sup>4</sup>

"The contract at the date of its making was unilateral, a mere offer that, if subsequently accepted and acted upon by the other party to it, would ripen into a binding enforceable obligation. When the respondent purchased and paid upwards of fifteen hundred dollars for a franchise, it had acted upon the contract; and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character, and if the appellant thereafter thought he discovered a ground for rescinding the contract, it was, as it always is, a necessary condition to the rescission that the other party should be made whole as to what he had parted with on the strength of the contract. The notice of withdrawal from the contract was ineffectual, therefore, for several reasons. In the first place, it was based on a wrong theory; the reason

<sup>1</sup> 79 Ga. 658.

<sup>2</sup> See also *Cook v. Casler*, 87 N. Y. App. Div. 8.

<sup>3</sup> 135 Cal. 654.

<sup>4</sup> *Ibid.*, 658.

given for it was that the road was not constructed within the agreed time, when, as was determined subsequently, there was no time agreed upon. Again it came too late, after the obligations of the parties had become fixed."

The case is singular. Considering it from the standpoint of the court, as expressed in the language quoted, we find an offer calling for an act, *i. e.*, a proposed unilateral contract. On this state of facts the court proceeds to tell us that after a portion of the requested act had been completed, it would be unjust to permit the offer to be withdrawn. That is to say, although the consideration had not been furnished, and hence no promise had arisen, yet, as it works injustice, the offer cannot be withdrawn. It seems that, though its notion was very vague, the court had in mind some idea of estoppel.

The opinion goes on to say that after part performance "the contract had taken on a bilateral character." This is a remarkable instance of confusion of thought. By what magic the offer had been turned into a "contract" does not appear. But then, in spite of the fact that it has said that a bilateral contract has arisen, the court seems to think that nevertheless there may be a withdrawal, provided the parties can be placed in *statu quo*. The expression "rescission," however, seems to indicate that the court considered that there was a contract. If there was a contract, what possible ground existed for rescission? If there was merely an offer, what can be intended by "restitution"? The defendants had received nothing to restore. Perhaps the court means that under such circumstances an offer cannot be withdrawn, because it believes there is then an estoppel. Again, at the end of the quotation, the court seems to have an idea that there is a contract after all, as shown by the expression "after the obligation of the parties had become fixed."

It is not very apparent what difference it could make whether the defendants assigned a correct or incorrect theory for their proceeding. The sole question is whether the defendants could withdraw their offer at any time before it ripened into a promise. It would seem that the court proposed to enforce its ideas of justice, even though it was not clear as to the theory upon which it should proceed. Nevertheless, a thought is suggested which will be further commented upon below.

The case has been discussed somewhat at length, both because it



is a good example of the lack of clear thinking which is often found in the opinions of the courts upon this subject and also because it suggests the idea of an estoppel or something analogous thereto.

It is not so clear that any such point as that raised by the court is necessarily involved. The action was upon a written instrument in form a promissory note. Can this be spoken of as an offer? What was the instrument when placed in escrow? It was not negotiable, and as there was no consideration it was not a contract. How can an offer be placed in escrow? The court says that the action was based "upon a written instrument." This writing seems to have been merely an acknowledgment of indebtedness which was delivered according to the terms of the escrow agreement. The facts hardly warrant the inference that the escrow agreement and the note were together intended as an offer. It seems probable that there was a bilateral contract made at the time of executing the escrow agreement. In that case it would be clear that the defendants could not withdraw.

It sometimes happens that a case is discussed on the assumption that a question of the revocation of an offer is involved, while in fact no such point is raised. Thus in *Blumenthal v. Goodall*<sup>1</sup> the plaintiff was a broker suing for his commission. He had been authorized by defendant to sell certain property, and had procured a customer who signed a memorandum, was ready to make a suitable deposit, and had received an abstract of title. Thereafter the defendant attempted to revoke his offer. Of course it was too late. The plaintiff had furnished the act requested, namely, producing a customer ready to buy, and hence the promise to pay the commission had arisen, and the defendant was then bound. The case was correctly decided and presents no difficulty.

In *Plumb v. Campbell*<sup>2</sup> the court touches upon the question of unilateral contract, and quotes with approval a statement by Parsons,<sup>3</sup> which seems to suggest that beginning to do an act is enough to cause the contract to arise. It is not at all clear that Parsons intended to lay down any such proposition, and from the entire statement it seems probable that he had bilateral contracts in mind, except in cases where the act has been performed, and hence a contract has arisen. *Plumb v. Campbell* did not directly involve the

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<sup>1</sup> 89 Cal. 251.

<sup>2</sup> 1 Parsons, Contracts, § 450.

<sup>3</sup> 129 Ill. 101.

point, because if there was an offer asking for the delivery of bonds as a consideration, which, though very doubtful, was the construction the court seemed to put upon the transaction, then as the delivery had taken place the act was performed. There was no attempted revocation, and the question arose with reference to the construction of the statute of limitations. It does, however, involve the question we are discussing, in that the point turned upon the time at which the contract arose.

The harsh results which are possible in this class of cases are revolting to a natural sense of justice, and there is a constant effort to devise some way out of the difficulty. Under these circumstances one is called upon to make sure that there is no fault with the analysis, and that the difficulty does not lie there, rather than with the rule of law.

An analysis of a simple contract shows the essential elements to be mutual assent and consideration. When an offer is made it can be accepted immediately. If such acceptance involves also a counter promise the contract arises thereupon. If anything except a counter promise is required as a consideration, there is no contract upon acceptance only, owing to the lack of consideration. In the case of the safe mover, put in the early part of this article, if the safe mover, either by word or action accepts the offer, we have agreement. If he completes the moving there is consideration. But, it is argued, the offer can be withdrawn at any time, until it becomes a promise, and acceptance does not affect this, because an irrevocable offer is inconceivable in law, and to hold otherwise is to do away with the doctrine of consideration.

However, it is not so certain that this argument is sound. To assume that an accepted offer calling for an act as consideration is under some circumstances irrevocable does not compel us to hold that such offer is already a promise or can be enforced as such. An offer remaining open is simply a statement by the offeror that he wishes a certain thing and will continue in that state of mind. Upon such indication of intent the withdrawal of the offer after the offeree has accepted and commenced to do the act in reliance thereon, will cause loss. Does that come under the ordinary rule of *estoppel in pais*?

The doctrine of consideration is not affected in any way. There is no promise until the consideration is completely performed, and the offeror can never be held to his proposed promise unless he receives the consideration, but nevertheless he cannot withdraw his offer.



Have we too readily acquiesced in the idea that an offer must necessarily be revocable under all circumstances? It may be urged that as the offeror has changed his mind, there is never actual mutual assent or agreement. But this is frequently the case, and does not prevent a contract from arising, as for instance, in cases of ineffectual attempts to revoke an offer.

The foregoing suggestion as to a possible estoppel does not meet all situations. Thus in the hypothetical case of the truckman given above, the hardship falls upon the merchant. As the truckman makes no offer it seems impossible to prevent him from leaving the goods in a suitable place, even though he thereby disappoints the just expectations of the merchant. There can be no estoppel in such a case at any rate. Again, in the safe case, if the owner takes possession of the safe, even though he be estopped from withdrawing his offer, there can be no contract, because the safe mover is prevented from performing by being deprived of the possession of the safe, and the supposed estoppel is of no avail because the consideration is not and cannot be performed. It is entirely immaterial that this result is brought about by the offeror's own act. The doctrine of consideration prevents a contract from arising.

Or, if the safe mover refuses to surrender the safe upon demand of the owner, and completes the act of moving, he thereby commits a tort, and public policy would seem to make it impossible for a tortious act to form the consideration of a promise.

Professor Williston says of this class of cases:

"To deny the offeror the right to revoke is, therefore, in effect to hold the promise of one contracting party binding, though the other party is neither bound to perform nor has actually performed the requested consideration.

"The practical hardship of allowing revocation under such circumstances is all that can make the question doubtful."

This argument, on the other hand, does not seem conclusive against the theory of an estoppel. Such a theory does not require, even in effect, that the promise of one should be binding although he has not received his consideration.

If the offeror is not allowed to withdraw his offer, this does not necessarily result in a promise, and it never will so result until the consideration, the act, is actually performed. It merely prevents

him from withdrawing his offer, when the circumstances may render such action unjust, but he has made no promise, and hence, necessarily, cannot be called upon to perform until he has received the consideration demanded. Thus both parties are protected, and a just result is attained.

It is by no means unusual for a party to place himself in a position where he is no longer free, although his offeree may be. This is practically the situation in cases of ineffectual revocation. The offeree is not yet bound, yet the offeror has changed his mind, and desires to escape the consequences of his offer. If he is unable to communicate a revocation he may become bound by a contract in spite of his wishes and attempts to escape. It is true that we are not accustomed to speak of an offeror as bound by his offer, but nevertheless he is responsible for its possible consequences, as he is for any action in his life.

An estoppel simply prevents him from withdrawing such action when it will work injustice to permit him to do so. It merely limits the power of revocation, and why should not such power be limited in such cases? The limitation takes place only when it is required by strict justice and when both parties are fully protected. Certainly these cases do not fall strictly within the equitable doctrine of *estoppel in pais*, as that subject has heretofore been developed, but a doctrine somewhat analogous thereto and depending upon the same ideas would seem to be possible, even though there may be some more suitable nomenclature.

When there is difficulty in escaping from a troublesome position it is too frequently the habit to drag in equitable estoppel with no clear idea of the meaning of the term, but with the satisfaction of knowing that it sounds well. Admitting such a danger it would still seem that this doctrine, hinted at in some of the decisions, may, in spite of some difficulties, offer relief from occasional intolerable situations.

As has been well said <sup>1</sup> there are few more troublesome positions in our law.

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<sup>1</sup> See Williston's Wald's Pollock, 3 ed. p. 34, n. 39. The hardship involved in these cases did not trouble Professor Langdell in the least. He merely said, "The true protection for both parties is to have a binding contract made before the performance begins, by means of mutual promises." (Summary of Contract, § 4.) This is much like replying to a question as to a specific for a certain poison: "Don't take the poison."



## IS THE FIFTEENTH AMENDMENT VOID?

N EARLY forty years have elapsed since the Fifteenth Amendment was proclaimed by the Secretary of State to be part of the Constitution of the United States. During that time, it has been hated with a deadly hatred by the section of the country it was designed chiefly to affect. It has been despised, flouted, nullified, evaded. Nevertheless, the Supreme Court of the United States, the lawful guardian of the Constitution, has in no single instance held any state or federal statute or the act of any state or federal officer to be in conflict with the Amendment; and no case in that court can be found which would have been decided differently if the Amendment had never existed.

In a number of cases, it is true, the Supreme Court has decided that the Amendment does *not* do this and does *not* do the other; but if the student of constitutional law, not content with such negative information as to what the Amendment does not do, seeks to ascertain affirmatively what, if anything, it has accomplished, he must find his way by the pure light of reason unaided by the binding authority of any actual decision of our highest court.

Confronted by these remarkable circumstances, the student of constitutional law not unnaturally asks himself: "Can it be that an enactment which has thus borne the slings and arrows of outrageous fortune for nearly forty years and yet during all that time has never affected the result in a single decided case in the court of last resort — can it be that such an enactment is indeed part of the fundamental law of the United States?" To consider one aspect of that question is the object of this article.

The assumptions will be indulged that the Amendment was proposed in a constitutional manner by two thirds of both Houses of Congress and was duly ratified by legislatures in three fourths of the states. Attention will be concentrated upon the question whether, assuming the Amendment to have been proposed and ratified in the manner prescribed for constitutional amendments, it is within the express and implied limitations on the power of three fourths of

the states to amend the Constitution. This involves a preliminary general consideration of the extent of the power of constitutional amendment.

## I.

The power of three fourths of the states to amend the Constitution of the United States would seem to be subject to two classes of limitations, — (1) inherent and (2) express.

1. The inherent limitation is that the so-called amendment must be a real amendment, and not the substitution of a new constitution.<sup>1</sup> It may alter many of the vital provisions of the original instrument; but so much of the old constitution must be left that the new provisions may be regarded as merely engrafted on the old stock. A wholly new constitution can be adopted only by the same authority that adopted the present constitution, namely, "the people of the United States," represented by the concurrent action of conventions in all the several states within which the constitution is to be operative.

To draw the line between a mere amendment of the old constitution and an instrument which makes such radical changes as to be fairly regarded only as a new constitution is difficult, not to say impossible. All that can be done is to give a few illustrations that would seem to fall on one side or the other of the line.

Of mere amendments which cannot be deemed to amount to a new constitution, excellent examples are furnished by the first twelve amendments. The Thirteenth Amendment, profoundly as it altered the social system in the slaveholding states, nevertheless falls on the same side of the line. The most important provision of the Fourteenth Amendment — the provision that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws — also falls within the same category. It is a new limitation on the powers of the states, but it does not so radically alter their relations as to amount virtually to a new constitution.

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<sup>1</sup> *Livermore v. Waite*, 102 Cal. 113, 118 (*semble*, as to a provision for "amending" a state constitution). The same distinction is illustrated by decisions that an "amendment" to a pleading cannot substitute a new case: *Shields v. Barrow*, 17 How. 130, 144; *Goodyear v. Bourn*, 3 Blatchf. 266; *Givens v. Wheeler*, 6 Colo. 149. So, too, a reserved power to "amend" a charter of incorporation does not extend to the substitution of a new charter: 2 *Morawetz, Priv. Corps.*, 2 ed., § 1096.



On the other hand, one may imagine so-called amendments which would in substance amount to the total abrogation of the old constitution. For instance, the Constitution contemplates a Federal Union, and a Federal Union of all the states; and probably a change which should destroy this fundamental character of the government would not be an "Amendment." Thus, a so-called amendment substituting two or more independent confederacies in the place of the union of all the states would seem not to be within the power of constitutional amendment. Even more clearly, a provision abolishing the several state governments and providing that all the powers of the British Parliament should be lodged in a national congress would be more than a mere amendment.

As already stated, it may often be difficult in the extreme to determine whether a supposed change in the constitution is of such a radical character as to amount to the adoption of a virtually new constitution so as not to be within the power of three fourths of the states on the initiative of two thirds of both Houses of Congress. Some assistance in this perplexity may, however, be afforded by the express limitations upon the power of amendment, which, therefore, it is now pertinent to consider.

Before doing so, it is proper to mention that when the resolution proposing the Fifteenth Amendment was under debate in Congress, the minority argued that it transcended the inherent limitations of the power of constitutional amendment.<sup>1</sup> This contention has recently been revived by the late Judge Morris of the Court of Appeals of the District of Columbia, who draws a distinction between an "amendment" and an "addition" to the Constitution.<sup>2</sup> Probably the learned judge is so far right that an "amendment" must be germane to something in the original instrument; but the difficulty with his contention is that the scope of the Federal Constitution is so broad that it is hard to maintain that any matter pertaining to government is not germane.

In this connection, however, it is observable that the original constitution intermeddled in but two clauses with the internal political affairs of the states,—(1) the guaranty of a republican form of

<sup>1</sup> Congressional Globe, 40th Cong., 3d Sess., 705 *et seq.* (*per* Dixon of Connecticut); 988 (*per* Hendricks of Indiana); 995, 997, 1631 (*per* Davis of Kentucky); 1639 (*per* Buckalew of Pennsylvania); *Id.* Appendix, 151 (*per* Doolittle of Wisconsin); 158-164 (*per* Saulsbury of Delaware); 285 (*per* Davis of Kentucky).

<sup>2</sup> No. Amer. Rev., Jan. 1909, vol. 189, p. 82.

government and (2) the prohibition of a grant of titles of nobility. Even these provisions merely perpetuated the existing political institutions of the state. Every state had a republican government, and no state granted titles of nobility. At most the provisions in question prevented the states from changing their existing governments in certain particulars.<sup>1</sup> Very different is an amendment compelling a state to alter its political institutions. The Fifteenth Amendment is the only example of such an interference with state politics.

2. The power of three fourths of the states to amend the Constitution is subject to the following express restriction:

"Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The clauses which were thus made unamendable prior to the year 1808 are the clause prohibiting the abolition of the slave trade before that year, and the clause requiring direct taxes to be apportioned among the states in proportion to the decennial census.

Now, these express limitations on the power of amendment are very significant. Their implication is far reaching. For instance, the prohibition of an amendment prior to 1808 interfering with the slave trade, euphemistically called the importation of persons, necessarily implied that no constitutional amendment should be adopted prior to 1808 abolishing slavery in the original states.

But the limitations on the power of amendment which expired in the year 1808 are no longer of practical importance. The provision, however, that no state without its consent shall be deprived of its equal suffrage in the Senate, being perpetual, is still in full force, and merits the most careful consideration.

In the first place, this proviso necessarily requires the continuance of the Senate as an integral part of the federal legislature. A state could not be deprived of its equal suffrage in the Senate merely by abolishing the Senate, or reducing it to a body merely advisory, concentrating all legislative power in the House of Representatives.

In the next place, this proviso necessitates the continued existence

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<sup>1</sup> The *Federalist*, in answering an objection to the Constitution based on the alleged dangerous character of the guaranty of republican government, laid stress on this feature. *Federalist* No. 42.



of the several states. As no state can be deprived, even by constitutional amendment, of its equal suffrage in the Senate, it follows that no state can be deprived of its own existence. In order that a state may enjoy equal suffrage in the Senate, it must continue to exist. Its identity must be preserved.

Moreover, the words "without its consent" necessarily imply that the state shall continue to exist as a body capable of consenting, or in other words as an autonomous political community. That a constitutional amendment may cut down the powers of the state may be conceded; but that it cannot deprive the state of its capacity for self-government within its sphere as thus restricted would seem equally clear. The inherent limitation of the power of amendment would perhaps of itself be sufficient to prevent any such change in the Constitution. For the Constitution in all its features contemplates a federal union of self-governing states; and any abrogation of that feature would seem to be more than a mere amendment. But however this may be, the matter is made quite clear by the proviso that no state shall be deprived of its equal suffrage in the Senate without its own consent.

That proviso was, therefore, aptly described in *The Federalist* as "a palladium to the residuary sovereignty of the states."<sup>1</sup>

The same clause would seem necessarily to imply that the composition of a state cannot be altered without its own consent; for the guaranty of equal suffrage was in favor of the states as they existed in 1789 and as they might subsequently be changed by their own consent or in pursuance of their own laws. If this were not so, the guaranty of equal suffrage in the Senate might be nullified merely by changing the state itself. For example, it will hardly be claimed that three fourths of the states by a constitutional amendment could force a territorial addition upon a small state and thus by enlarging its electorate deprive the residents of the original territorial limits of the state of their exclusive right to elect members of their state legislature and thus indirectly to choose two United States senators. For example, would it be possible for three fourths of the states by a constitutional amendment to provide that the island of Porto Rico, with a population largely in excess of the present State of Rhode Island, should be annexed to that state without its consent, and that the inhabitants of Porto Rico should have the right to vote

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<sup>1</sup> *The Federalist*, No. 43 (8). See also 1 Tucker on the Const. p. 323.

in state elections anything in the constitution or laws of Rhode Island to the contrary notwithstanding? Would not such a constitutional amendment deprive Rhode Island of its suffrage in the Senate? It is true that two senators would continue to sit nominally as senators from Rhode Island, but the Rhode Island which they would represent would not be the Rhode Island known to the Constitution. That Rhode Island would be swallowed up and lost. The name might remain: the substance would be gone.

Hence, it appears that the prohibition of any constitutional amendment depriving any state of its equal suffrage in the Senate implies as a necessary corollary that no constitutional amendment shall alter the composition of a state; and, therefore, it becomes pertinent to inquire what a state is, and how and of whom or of what it is composed. When the Constitution declares that "No State without its consent shall be deprived of its equal suffrage in the Senate," what is meant by "State"? What is a state? In favor of whom, or of what, is this guaranty?

A state may be defined as a political community united under an organized government and exercising sovereignty over a certain territory; the purely geographical sense is derivative and figurative. This has been held by the Supreme Court after full consideration.<sup>1</sup> "The primary conception," said Chief Justice Chase speaking for the court, "is that of a people or community. The people . . . constitute the state. . . . In the Constitution the term state most frequently expresses the combined idea . . . of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."

This principle that the word "state" in the Constitution means primarily the body of citizens invested with political rights has been recognized from the very foundation of the Union. Justice Wilson, who had been a prominent member of the Convention which framed the Constitution, defined a state as "a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own and to do justice to others."<sup>2</sup>

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<sup>1</sup> *Texas v. White*, 7 Wall. 700, 720-721.

<sup>2</sup> *Chisolm v. Georgia*, 2 Dall. 419, 455.



Justice Iredell expressed himself a few years later even more emphatically to the same effect:

"A distinction was taken at the bar between a State and the people of the State. It is a distinction I am not capable of comprehending. By a State forming a Republic (speaking of it as a moral person) I do not mean the Legislature of the State, the Executive of the State, or the Judiciary, but all the citizens who compose that State and are, if I may so express myself, integral parts of it; all together forming a body politic."<sup>1</sup>

In these definitions the leading commentators concur.<sup>2</sup>

Sir William Jones has, therefore, defined a state not merely with the fervor of a poet but with the accuracy of a lawyer. What constitutes a state? Not high raised battlement, not mere territory, but men — these constitute a state.

The comparatively few instances in the Constitution in which the word is used in the purely geographical sense to designate the territory over which the state government exercises sovereignty, are easily detected; for we have only to substitute for the word "state," the phrase "area of the state" or "the territory of the state." If the substitution does not alter the meaning, the word is used in the geographical sense; but if on the other hand the substitution makes nonsense of the passage, the word is certainly not used in that sense.

Thus, in the provision that a representative must be an inhabitant of the state in which he shall be chosen, the word is used in its geographical meaning; for without altering the sense, we might read "inhabitant of the area of the state." This is even more clearly true in the clause providing that criminal trials shall take place in the state where the crimes shall have been committed.

Now, in the provision that "no state without its consent shall be deprived of its equal suffrage in the Senate," the word "state" is certainly not used in the geographical sense; for the expression "its consent" shows that the word refers to some person or persons, or to some organization or corporation, capable of consenting. A geographical area cannot consent; and if we should read "no geographical area without its consent shall be deprived of its equal suffrage in the Senate," the clause would become nonsense. There-

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<sup>1</sup> *Penhallow v. Doane's Admr.*, 3 Dall. 54, 93.

<sup>2</sup> 1 Story on Const. § 208; Cooley, Const. Lims., 7 ed. 1.

fore the word "state" in this place means either the citizens of the state or the government of the state, or else it indicates a blending of the two ideas of people and government. Hence, the clause we are now considering means either that "the citizens or voters of no state without their consent shall be deprived of their equal suffrage in the Senate," or else that "the government of no state without its consent shall be deprived of its equal suffrage in the Senate." In the one aspect, the prohibition would prevent any constitutional amendment enlarging the class of people who constitute the citizenship or electorate of the state, and in the other aspect it would prevent any change in the government or political institutions of the state. If, as is not unlikely, the word "state" in this article of the Constitution refers both to the people of the state and to its government, the prohibition would extend to any change in the class of people who constitute the state, or in their government or political institutions.

A constitutional amendment which should attempt to alter the class of persons who compose the state, and constitute its electorate and repository of political power, would be objectionable on both grounds, even though no change were made in the territorial jurisdiction of the state. It would deprive the state as originally constituted of its suffrage in the Senate. For instance, imagine a constitutional amendment which, without altering the territorial jurisdiction of Rhode Island, should provide that all residents of the city of New York, or of the territory of Porto Rico, or of the Philippine Islands, should have the right to vote in elections for members of the Rhode Island legislature. Such a constitutional amendment would as completely swamp Rhode Island as if foreign territory had been annexed. It would deprive the original citizens of Rhode Island of their exclusive right to elect two senators.

## II.

Now let us investigate exactly what changes in the law were attempted to be made by the Fifteenth Amendment, or by the Thirteenth, Fourteenth, and Fifteenth Amendments operating in conjunction. We shall then be in a position to determine whether or not the Fifteenth Amendment exceeds the express or implied limitations of the power of constitutional amendment.



By the common law of all the states, the negroes were slaves — chattels. They were not part of the body politic. They were in no sense citizens.<sup>1</sup> They were “on the same footing with living property of the brute creation.”<sup>2</sup> Upon these propositions there has never been any difference of legal opinion, however justly the law which assigned this status of mere property to human beings may have been assailed as barbarous, and however heartily we may rejoice that such a law has ceased to exist.

As more fully explained below, a bitter dispute arose shortly before the Civil War whether even free negroes were, or could be made, citizens and members of the body politic. But those who would answer that question in the affirmative never asserted that slaves were citizens or constituted part of the “people” of the state in which they were held in bondage, or of the United States.

For example, the Supreme Court of Michigan in 1872 in an opinion delivered by Judge Cooley, although dissenting from Chief Justice Taney’s doctrine as enunciated in the Dred Scott Case, and although declaring free negroes born in this country to be citizens, nevertheless held that slaves were not citizens and that therefore a child born in Canada of slave parents who had fled or emigrated from Virginia was not made a citizen of the United States by the Act of Congress which provides that children born abroad of citizens of the United States shall be deemed citizens.<sup>3</sup> The child’s parents, though born in the United States, were slaves and therefore not citizens within the meaning of the Act of Congress.

Now, it is these negro slaves, these strangers to the social compact, whom the Fifteenth Amendment attempts to invest with the highest political right. Let us disregard for the moment the various stages of the process; for unless the power of constitutional amendment extends to the conversion *per saltum* of slaves into voting citizens, the same result cannot be accomplished more gradually by a series of constitutional amendments.

It will thus be seen that the change is a most serious one in the

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<sup>1</sup> 2 Kent Comm. \*258, note; *Texas v. White*, 7 Wall. 700, 721 (“A state, in the ordinary sense of the Constitution, is a political community of *free* citizens”); *Scott v. Sandford*, 19 How. 393, 585-586, 587 (*per* Curtis, J.).

<sup>2</sup> *Jarman v. Patterson*, 7 T. B. Monr. (Ky.) 644, 645-646 (1828); *State v. Dorsey*, 6 Gill (Md.) 388, 390 (1848); *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 62.

<sup>3</sup> *Hedgman v. Board of Registration*, 26 Mich. 51.

composition of the state and in its scheme of government. It amounts to a forcible annexation to the state of a large number of persons who had never before constituted part of its body politic, who were not its citizens, and who under its laws were no more entitled to political rights than the Zulus of Africa or the Bushmen of Australia. The case is the same in principle as if an extensive and populous foreign territory had been annexed to the state without its consent.

Take as an illustration a state like South Carolina within whose borders the negroes outnumbered the whites.<sup>1</sup> Notwithstanding their numerical majority they were mere property, and enjoyed no political or even civil rights. They were not members of the body politic, and were not parties to the social compact. The white people and they alone constituted the State of South Carolina. Now, could a constitutional amendment without the consent of the government of South Carolina, or of those persons who constituted that state, annex to their body politic the large black majority in their midst and give these blacks — whom South Carolina had never recognized as her citizens — the power to outvote the whites in the election of members of the state legislature and thus indirectly in the choice of two United States senators? Would not such a constitutional amendment deprive the people whom alone the original Constitution of the United States and the laws of South Carolina recognized as constituting that state — would it not deprive them of their "equal suffrage," or indeed of any suffrage at all, in the Senate?

The Fifteenth Amendment amounts to a compulsory annexation to each state that refused to ratify it of a black San Domingo within its borders. It is no less objectionable than the annexation of the San Domingo in the Spanish main.

Before the Amendment, the white people of South Carolina had the right and power to elect two senators of the United States — the same representation in the Senate as the white people of Vermont. After the Amendment, if it is valid, the white people of Vermont, a state which contains virtually no negroes and which therefore is virtually unaffected by the Amendment, continue to be entitled to elect two senators; but the white people of South Carolina have none at all.

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<sup>1</sup> The principle is, of course, the same in states where the proportion of negroes to whites is somewhat smaller, as in the border states. South Carolina is taken as a mere illustration; and the fact is not overlooked that under the Reconstruction Acts negroes were voting in South Carolina even prior to the Fifteenth Amendment.



## III.

But it will be objected that this argument carries too far, — that the negroes were already converted into citizens, or members of the body politic, by the Thirteenth and Fourteenth Amendments, although not clothed with the elective franchise, and that if it were impossible to alter the composition or membership of the state, those amendments, upon which scores of judicial decisions have turned, would be invalid, and human slavery would still be constitutionally possible in the United States.

To this supposed *reductio ad absurdum* of the argument there are at least three answers.

I. The Thirteenth Amendment merely released the slaves from the dominion of their masters and did not invest them with any rights of citizenship against the will of the states in which they might reside. This may be made manifest by a consideration of the political status of free negroes before the Civil War.

The status of that class of persons was much discussed in the *Dred Scott Case*.<sup>1</sup> It will be remembered that the question upon a plea in abatement was whether a free negro, descended from slaves, resident in a state, could sue in the federal courts as a citizen of that state. Chief Justice Taney and two of the associate justices,<sup>2</sup> or perhaps three,<sup>3</sup> held that he could not do so, even though the state in question might recognize him as a citizen; no person of African blood descended from slaves, whatever rights and privileges might be conferred upon him by state law, could be deemed a citizen within the meaning of the clause in the federal Constitution conferring jurisdiction over controversies between citizens of different states. Mr. Justice Curtis, dissenting, held that the whole matter depended upon state law; if a free negro should be recognized as a citizen by the law of the state of his birth and residence, he would be deemed by the federal courts a citizen of that state and of the United States, but if on the other hand the state law should not accord him the status of citizen, he would not be deemed a citizen by the federal

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<sup>1</sup> *Scott v. Sandford*, 19 How. 393 (1856).

<sup>2</sup> Wayne and Daniel, JJ.

<sup>3</sup> It is not clear from Justice Grier's brief and rather obscure remarks (19 How. 469) whether he agreed with the Chief Justice on this question or had formed no opinion thereon.

courts.<sup>1</sup> Three<sup>2</sup> or perhaps four<sup>3</sup> justices expressed no opinion upon the question. Mr. Justice McLean held (1) that the decision on the plea in abatement, having been in favor of the plaintiff in error, was not open to review in the Supreme Court, but (2) that if it were, the plaintiff though of African descent "being a freeman, and having his domicile in a State different from that of the defendant, he is a citizen within the Act of Congress and the courts of the Union are open to him."<sup>4</sup> If the learned judge meant that a free negro resident in a state was a citizen thereof for purposes of the jurisdiction of the United States courts whether or not recognized by the law of that state as one of its citizens, he stood alone among the members of the court; and few persons would prefer his opinion, unsupported as it was by any reasoning, to the careful and reasoned judgment of Justice Curtis.

We may, therefore, take it as clear that truth lay either with Chief Justice Taney or with Justice Curtis. According to the view of the one, free negroes could not be made citizens within the meaning of the federal constitution by any state or federal law or action; according to the view of the other, they might or might not be citizens according as the state law should provide. In any state which by its legislature or judiciary had distinctly declared that free negroes born or resident within its boundaries should not be deemed citizens, both the Chief Justice and Justice Curtis would have concurred in holding that such free negroes would be citizens neither of the state nor of the United States.

Hence it becomes pertinent to examine the state laws as to the status of free negroes. In at least six states, one of them a Northern state, — Kentucky,<sup>5</sup> Pennsylvania,<sup>6</sup> Tennessee,<sup>7</sup> Arkansas,<sup>8</sup> Mis-

<sup>1</sup> His conclusion was "that it is left to each state to determine what free persons, born within its limits, shall be citizens of such state, and thereby be citizens of the United States." 19 How. 577, 588.

<sup>2</sup> Nelson, Campbell, and Catron, JJ.

<sup>3</sup> As stated above, the position of Grier, J., is not clear.

<sup>4</sup> 19 How. 531-532.

<sup>5</sup> *Amy v. Smith*, 1 Lit. (Ky.) 326 (1822). There were other grounds sufficient to support the decision; but the *dictum* would undoubtedly have been adhered to. See *Marshall v. Donovan*, 73 Ky. 681.

<sup>6</sup> *Hobbs v. Fogg*, 6 Watts (Pa.) 553 (1837), holding that free negroes were not entitled to vote under the Pennsylvania Constitution of 1790 conferring the elective franchise on "every freeman of the age of twenty-one years." The opinion is an able one by Chief Justice Gibson.

<sup>7</sup> *State v. Claiborne, Meigs* (Tenn.) 331 (1838).

<sup>8</sup> *Pendleton v. State*, 6 Ark. 509 (1845).



issippi,<sup>1</sup> and Georgia,<sup>2</sup> — the courts of last resort even prior to the Dred Scott Case had distinctly announced that free negroes were not citizens. Both Taney and Curtis would have agreed that free negroes resident in those states were not citizens.<sup>3</sup> In North Carolina there had been in 1838 an elaborate *dictum* that free negroes were citizens,<sup>4</sup> but six years later this *dictum* was qualified or retracted.<sup>5</sup> The advocates of the view that free negroes were or might become citizens of a state were able to point to some legislative and administrative precedents; but prior to the Dred Scott Case there was no judicial decision in their favor, and several opposed to them. After the Dred Scott Case, the courts on both sides of Mason and Dixon's Line began to approach the question in a spirit of partisanship. Any Southern courts in which a lawyer might have thought it worth while to raise the question would undoubtedly have followed Chief Justice Taney;<sup>6</sup> and the judges in Northern states were almost equally certain to follow Justice Curtis.<sup>7</sup> This, however, is of little importance; for all agreed that no state could be forced to admit its free negroes to citizenship.

Hence the Thirteenth Amendment merely emancipated the slaves and gave them the status of free negroes.<sup>8</sup> It did not convert them into citizens, against the will of the states in which they might reside. For instance, in Kentucky, which by its Supreme Court had an-

<sup>1</sup> Leach v. Cooley, 6 Sm. & M. (Miss.) 93 (1846).

<sup>2</sup> Cooper v. Mayor & Aldermen of Savannah, 4 Ga. 68 (1848); Bryan v. Walton, 14 Ga. 185 (1853); Bryan v. Walton, 20 Ga. 480 (1856).

<sup>3</sup> See 19 How. 587, where Justice Curtis says, "Not only slaves but free persons of color born in some of the States are not citizens."

<sup>4</sup> State v. Manuel, 4 Dev. & Bat. Law (N. C.) 20 (1838).

<sup>5</sup> State v. Newsome, 5 Ired. (N. C.) 250 (1844).

<sup>6</sup> See Heirn v. Bridault, 37 Miss. 209 (1859); Mitchell v. Wells, 37 Miss. 235 (1859); (where the partisanship of the opinion of the court is in painful contrast with the lawyer-like and even-tempered dissenting opinion of Judge Handy, who however fully recognized that free negroes were not citizens); Donovan v. Pitcher, 53 Ala. 411 (1875); *Ex parte Merry*, 26 Tex. 23 (1861). The case of Walsh v. Lallande, 25 La. Ann. 188 (1873), is *contra*, but was decided by the reconstruction or "carpet-bag" court.

<sup>7</sup> Opinion of the Justices, 44 Me. 505 (1857) (an advisory opinion to the legislature); Opinion of the Judges, 32 Conn. 565 (1865) (noting that in a case decided in 1834, Crandall v. State, 10 Conn. 339, the Chief Justice had been of the contrary opinion, but that the court had found the question unnecessary to be decided); Smith v. Moody, 26 Ind. 299 (1866) (disregarding *dictum* to the contrary in Thomasson v. State, 15 Ind. 449 (1860)); Hedgman v. Board of Registration, 26 Mich. 51 (1872).

<sup>8</sup> Civil Rights Cases, 109 U. S. 3.

nounced as early as 1882 that free negroes were not citizens,<sup>1</sup> the freedmen, in the interval between the adoption of the Thirteenth and Fourteenth Amendments were certainly not citizens.<sup>2</sup>

The Thirteenth Amendment, therefore, made no negro a citizen of a state against its will, and consequently is not obnoxious to the objection raised against the Fifteenth Amendment that by altering the membership or composition of the state it deprives the state as originally constituted of its guaranteed representation in the Senate.

2. The Fourteenth Amendment did undoubtedly purport to convert the freedmen into "citizens of the United States and of the State wherein they reside"; and to that extent attempts to alter the membership or composition of the states. If it were admitted that the argument above deduced from the provision that no state without its consent shall be deprived of its equal suffrage in the Senate would, if sound, prevent this change in the citizenship or membership of the body politic, even though the elective franchise was not conferred upon the new members, the only result would be to strike out of the Fourteenth Amendment the seven words "and of the State wherein they reside." There is no conclusive authority that the words quoted are a valid part of the Amendment;<sup>3</sup> and all the important provisions of that Amendment, such as the guaranty of due process of law and of the equal protection of the laws, would remain undisturbed. That an argument leads to the elimination of those seven words can, therefore, hardly be deemed a *reductio ad absurdum*.

3. But it may well be doubted whether the elevation of the negroes to citizenship in the states by the Fourteenth Amendment is more than a matter of sentiment or name, and whether in that light it could be regarded as infringing the guaranty of political autonomy implied in the proviso that no state shall be deprived of its equal suffrage in the Senate without its own consent. The Fourteenth

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<sup>1</sup> *Amy v. Smith*, 1 Lit. (Ky.) 326.

<sup>2</sup> *Marshall v. Donovan*, 73 Ky. 681 (1874).

<sup>3</sup> For cases in which the validity of those words in the Amendment has been assumed, although in none of them was it necessary to the decision, see *Slaughter House Cases*, 16 Wall. 36, 72-73; *Bradwell v. State*, 16 Wall. 130, 138; *Minor v. Happersett*, 21 Wall. 162, 165; *Boyd v. Nebraska, ex rel. Thayer*, 143 U. S. 135, 158, 160, 161; *Van Valkenburg v. Brown*, 43 Cal. 43; *Elk v. Wilkins*, 112 U. S. 94, 101. See also *Clausen v. Am. Ice Co.*, 144 Fed. 723.



Amendment gives negroes the right to sue and be sued in the federal courts as citizens of the state of their residence; but to confer that privilege is certainly within the scope of a constitutional amendment. It also protects them in other states from discrimination in respect to the fundamental rights of person and property, under the provision that citizens of each state shall be entitled to the privileges and immunities of citizens in the several states; but that too is within the scope of a constitutional amendment. It does little, if anything, more of practical importance. It is at most a grant of the civil rights pertaining to citizenship in a state.

Certainly the citizenship attempted to be conferred by the Fourteenth Amendment does not imply the enjoyment of any political rights or share in the government. The case of women is the most familiar example of the truth of this proposition. The state is entitled to withhold the suffrage from such of its citizens as it chooses and (unless the Fifteenth Amendment may restrict the power) on such grounds as it chooses. The objection to the Fifteenth Amendment is not merely that it alters the technical citizenship or membership of the state, but also that it alters its political institutions and destroys its political autonomy.

In view of these facts, it may be doubted whether the argument advanced above necessarily goes to the extent of invalidating the provision in the Fourteenth Amendment that all persons born or naturalized within the United States and subject to the jurisdiction thereof are citizens of the state wherein they reside; but if the argument does necessarily carry to that length, there is no reason to shrink from that conclusion. Certainly, that fact, if it be a fact, is no reason for denying the soundness of the argument.

4. The guaranty of equal protection of the laws contained in the Fourteenth Amendment prevents class legislation, or discrimination on account of race or color or any similar ground, but only in respect to civil rights. It has no reference to political rights such as the right to vote. Otherwise, the Fourteenth Amendment would have conferred suffrage upon the negroes, if any constitutional amendment could do so; and there would have been no occasion for the Fifteenth Amendment. Moreover, the second section of the Fourteenth Amendment, by the provision for reduction of representation in Congress, clearly recognized that, notwithstanding all the provisions of the first section, the states were intended to remain at

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liberty to deny the suffrage to negroes.<sup>1</sup> Hence that clause of the Fourteenth Amendment need not be further considered.

#### IV.

Some critics may object, however, that the power vested in Congress "To establish an uniform rule of naturalization" has some bearing upon the alleged power to add the freedmen and their descendants to the body politic of a state against its consent.

1. This cannot be admitted. The power of naturalization extends only to aliens — persons who are subject to the jurisdiction of some foreign state. A person born within the jurisdiction of the United States can never be brought within the power of naturalization. For instance, in the *Dred Scott* Case, judges who differed so widely as Chief Justice Taney and Justice Curtis were agreed that free negroes could not be made citizens by any process of naturalization.<sup>2</sup> All the other authorities are to the same effect.<sup>3</sup>

2. The argument that the delegation to the federal government of the power to naturalize aliens shows that the power to introduce new members into the body politic cannot be so serious a change in the composition of the state as the argument above set out would indicate, and cannot be taken impliedly to be forbidden by the prohibition of any constitutional amendment depriving a state without its consent of its equal suffrage in the Senate, involves a complete *non sequitur*. Because the states may have yielded up a limited power to introduce new members into their bodies politic, does it follow that a very different and much more dangerous power can be wrested from them? Because a state may have consented to receive into its bosom the foreigners who may immigrate to its shores and whom Congress may see fit to naturalize, does it follow that its membership may further be diluted, and even overwhelmed, by the addition of a mass of members of an inferior race resident in its borders but not admitted by its laws to citizenship?

But the power of naturalization does not enable Congress to con-

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<sup>1</sup> *McPherson v. Blacker*, 146 U. S. 1, 38-39; *Minor v. Happersett*, 21 Wall. 162; *Van Valkenburg v. Brown*, 43 Cal. 43.

<sup>2</sup> *Scott v. Sandford*, 19 How. 393, 417 (*per* Taney, C. J.), 578 (*per* Curtis, J.).

<sup>3</sup> *E. g.*, *U. S. v. Rhodes*, 1 Abb. (U. S.) 28, 45 (*per* Swayne, J.); *City of Minneapolis v. Reum*, 56 Fed. 576, 577 (*per* Sanborn, Circ. J.).



fer the suffrage on naturalized foreigners.<sup>1</sup> At most, naturalization confers a technical citizenship on the foreigner; and the states are still at liberty to withhold from him any or all political rights. As stated above, such citizenship is largely a matter of name and sentiment. Naturalization, therefore, does not have the same, or a similar, perturbing effect as the Fifteenth Amendment upon the political composition and government of the state.

Moreover, it may be questioned whether the power of naturalization extends any further than the admission of aliens to citizenship in the United States as distinguished from citizenship in the state.<sup>2</sup> For, conversely, though the federal power of naturalization is exclusive, a state may admit an unnaturalized alien to membership in its own body politic, endow him with the suffrage and with full political rights, investing him with local or state citizenship,<sup>3</sup> although the state is without power to make him a citizen of the United States,<sup>4</sup> and although notwithstanding his state citizenship he remains entitled to sue or be sued in the federal courts as an alien.<sup>5</sup>

## V.

It may also be objected that even apart from the War Amendments, the provision that citizens of each state shall be entitled to the privileges and immunities of citizens in the several states would enable one state, by admitting negroes to citizenship and political privileges, to entitle them to like rights in other states. If this were so, it would furnish no ground for inferring a power to annex to a state by constitutional amendment those negroes within its own borders who have never been citizens of another state. But the constitutional provision in question refers only to fundamental civil privileges and immunities, and does not confer any such political privilege as the elective franchise.<sup>6</sup> Moreover, the instant a citizen

<sup>1</sup> *Pope v. Williams*, 193 U. S. 621, 633.

<sup>2</sup> If this were not so, the word "naturalized" in the first section of the Fourteenth Amendment would be surplusage. But see *Gassies v. Ballou*, 6 Pet. 761 (1832).

<sup>3</sup> *Re Uhltz*, 16 Wis. 443.

<sup>4</sup> *State v. Cole*, 17 Wis. 674.

<sup>5</sup> *City of Minneapolis v. Reum*, 56 Fed. 576; *Lanz v. Randall*, 4 Dill. 425. Cf. *Scott v. Sandford*, 19 How. 393, 405, 406.

<sup>6</sup> *Campbell v. Morris*, 3 H. & McH. 535, 554. See also 1 Mich. L. Rev. 286, 292-293 (article by W. J. Myers). Cf. *Pope v. Williams*, 193 U. S. 621. Unless in the Dred

of one state becomes a citizen of another state (as he must do in order to vote in that state), he ceases to have in that state any benefit from the constitutional guaranty.<sup>1</sup>

## VI.

It may also be urged that by means of the power to admit new states, Congress may evade the guaranty to each state of equal suffrage in the Senate, and that this possibility of evading the provision in one way shows that there can be no objection to evading it in another way, — namely, by altering the composition or membership of the state and thus injecting into its electorate a controlling hostile element. This argument, like those answered in the last two divisions of this article, amounts to a *non sequitur*. Because one method of circumventing the guaranty of equal suffrage in the Senate may be constitutionally possible, it does not follow that another and wholly different method of accomplishing the same or a similar result is permissible.

But as a matter of fact the power to admit new states cannot be used to accomplish anything like the revolutionary results of the Fifteenth Amendment. It is true that Congress might divide New York into forty states, each having a population approximately equal to that of Delaware; and in this way the component parts of the original State of New York would acquire a vote in the Senate largely preponderating over that of Delaware. But the assent of New York would be necessary to any such arrangement, and Delaware may safely repose in the assurance that New York would never consent to its own dismemberment. Moreover, even if such a process of subdividing the larger states were ever consummated, the small states such as Delaware would retain their own existence and would stand on an equality with all the other states. Because it is possible to subdivide the large states with their consent into states of the size of the smallest state, does it follow that an amendment may take from the citizens of a state control of its own govern-

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Scott Case, Taney was wrong and Curtis right, free negroes could not claim the benefit of this clause of the Constitution at all, even in respect to civil as distinguished from political rights.

<sup>1</sup> Scott v. Sandford, 19 How. 393, 422 (*per* Taney, C. J.); Bradwell v. State, 16 Wall. 130, 138.



ment, transferring control to a mass of persons who are external to its electorate and citizenship, thus depriving the original citizens and members of the state of all effective representation in their own state government and in the Senate of the United States?

Indeed, the power of a majority of the states to admit new states in sufficient numbers to pass a constitutional amendment furnishes a strong reason for giving full effect, in spirit and in letter, to the proviso that no state shall be deprived of its equal suffrage in the Senate without its own consent — the only effective “palladium to the residuary sovereignty of the states” against a tyrannical and determined majority.

## VII.

Perhaps the strongest obstacle to be overcome by the argument advanced in this article is a vague but obstinate idea that the guaranty of equal suffrage means no more than that two senators must continue to sit nominally on behalf of each state.

A moment's reflection will demonstrate that this idea is unsound. Suppose a constitutional amendment should provide that the two senators from Massachusetts should be elected by the legislature of New York, or that the legislature of Massachusetts should be elected by citizens of New York, would anybody deny that Massachusetts would be deprived of its equal suffrage, and indeed of any suffrage at all, in the Senate? There would continue to be in name two senators from Massachusetts, but in name only.

So it is under the Fifteenth Amendment. When that Amendment went into effect in such a state as South Carolina<sup>1</sup> and provided that the two senators from South Carolina should not be elected by a legislature of that state chosen by its citizens, namely, the white people resident within its boundaries, but by an electorate in which those citizens of South Carolina constituted a mere minority, there ceased to be, in anything but name, two senators from South Carolina. The South Carolina by whom the senators were thenceforth chosen and whom they represented was not the South Carolina of the Constitution. It was in substance a new state in which the citizens of the true South Carolina were a helpless minority.

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<sup>1</sup> See *supra*, p. 178, note 1.

Suppose a constitutional amendment should confine the suffrage to Roman Catholics. Would not such an amendment deprive the descendants of the Pilgrim Fathers of their representation in the Senate? Would it not deprive the State of New Hampshire, with a citizenship which is still ninety per cent Protestant, and which at the adoption of the Constitution was almost if not quite exclusively of that faith, of its suffrage in the Senate? Yet, such a constitutional amendment would be unobjectionable if the Fifteenth Amendment is valid.

But it may be said that the white people of the South have been able, notwithstanding the Fifteenth Amendment, to regain control of their state governments, and that therefore the effect of that amendment cannot be so revolutionary as the trend of this article would assume. Without conceding the soundness of this argument even were its premises admitted, we may point out that if the Fifteenth Amendment be valid, the means by which the white people of the South regained control of their states, however justifiable morally, must have been illegal. Having once succeeded by illegal means in securing control of their states, they may perhaps by disfranchising laws based on some pretext other than race or color succeed in retaining power without further violation of law; but the restoration of political power to the white people of the South can only have had its origin in illegality, unless the Fifteenth Amendment is void.

### VIII.

The Constitution does not altogether prohibit amendments depriving a state of its equal suffrage in the Senate, but only prohibits such deprivation without the consent of the state. For instance, Delaware would have no right to complain of an amendment depriving Maryland of her suffrage in the Senate. It might be urged, therefore, that the Fifteenth Amendment should at all events be held operative in those states which assented to it, or were counted as assenting to it. According to this view, the Amendment would be operative in all the far southern states, and in fact throughout the Union except in Delaware, Maryland, Kentucky, Tennessee, California, and Oregon — the six states which are acknowledged never to have ratified the amendment. But the Fifteenth Amendment evidently contemplates a uniform rule throughout the whole



country. Therefore, it will hardly be disputed that if for any reason the amendment cannot be constitutionally enforced in one of the states, then it is void and inoperative in all of them.

Of the six states above enumerated as refusing to concur in the Fifteenth Amendment, three — Delaware, Maryland, and Kentucky — also rejected the Fourteenth Amendment; and two of those three — Delaware and Kentucky — refused to consent to the Thirteenth. There are, therefore, two states which never consented to any of the three War Amendments; and in those states at least the entire process of converting slaves into voters was dissented from and opposed at every stage by the legal government of the state.

### IX.

A final objection is that it is now too late to question the validity of the Fifteenth Amendment. Many answers may be given to this objection.

In the first place, as was mentioned at the very outset of this article, not only has the question never been expressly raised in the Supreme Court of the United States, but there is no decision of that tribunal in which a different result would have been reached if the Fifteenth Amendment had never been conceived. If that amendment is proved to be invalid, there is not a single decision of the Supreme Court which would have to be on that account acknowledged to have been wrongly decided. Consequently, the doctrine of *stare decisis* furnishes no obstacle to holding that the Fifteenth Amendment is invalid.

In several cases, the Supreme Court has proceeded on the assumption of the validity of the Fifteenth Amendment and has considered its construction; but in all these cases the conclusion ultimately reached was that the amendment according to its true construction did not sustain the contention of the party relying thereon.<sup>1</sup> Such cases cannot as authority for the validity of the amendment amount to more than *obiter dicta*. In none of them were the questions raised

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<sup>1</sup> U. S. *v.* Reese, 92 U. S. 214 (1875); U. S. *v.* Cruikshank, 92 U. S. 543, 555-556 (1875); Neal *v.* Delaware, 103 U. S. 370, 385-393 (1880); U. S. *v.* Harris, 106 U. S. 629, 637 (1882); *Ex parte* Yarborough, 110 U. S. 651, 664-665 (1884); James *v.* Bowman, 190 U. S. 127 (1902). More casual references to the Amendment are found in Slaughter House Cases, 16 Wall. 36, 71 (1873); Minor *v.* Happersett, 21 Wall. 162, 175 (1874); McPherson *v.* Blacker, 146 U. S. 1, 37, 38 (1892); Giles *v.* Teasley, 193 U. S. 146 (1904); Pope *v.* Williams, 193 U. S. 621, 632 (1904); Elk *v.* Wilkins, 112 U. S. 94, 109 (1884).

by this article suggested in argument or in any way brought to the attention of the court.

Moreover, there seems to be no reported decision of a state court of last resort which necessarily involves the validity of the Fifteenth Amendment.<sup>1</sup> If the amendment is invalid, a few reported cases in lower federal courts must be admitted to have been wrongly decided;<sup>2</sup> but most of them have been since overruled, and in none of them were the points here raised in any way suggested by counsel or considered by the court. Such cases are, certainly, of little weight as authority.

Mere lapse of time is no bar against attacking the validity of the amendment. If twenty years must elapse in order to toll a private right of entry, how long a period is necessary to bar the most sacred constitutional rights of sovereign states? When, in 1856, the validity of the Act of Congress of 1820 known as the Missouri Compromise was challenged, no judge contended that the thirty-six years which had elapsed since its passage and in which its provisions had been cheerfully acquiesced in by the whole country, should prevent the court from examining and deciding the question on its merits. The utmost weight of any such lapse of time was expressed by Justice Curtis with characteristic accuracy:<sup>3</sup>

"A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind, on a question of the interpretation of the Constitution."

Now, such measure of recognition and acquiescence as the Fifteenth Amendment has commanded was not "nearly contempora-

<sup>1</sup> The nearest approach is *Wood v. Fitzgerald*, 3 Ore. 568 (1870), where in a contested election case the court declared that the votes of two negroes who were disqualified by the state constitution ought to be counted. But if the votes of the negroes had been rejected, the result of the election would not have been affected, as one of the two candidates for whom they both voted was held to be defeated notwithstanding their votes were counted in his favor, whereas the other would have had, according to the court's count, a majority even without their two votes.

<sup>2</sup> *Kellogg v. Warmouth*, Fed. Cas. No. 7,667 (1872) (overruled by *U. S. v. Reese*, 92 U. S. 214); *U. S. v. Crosby*, 1 Hughes 448 (1871) (overruled by *Karem v. U. S.*, 121 Fed. 250, and *Lackey v. U. S.*, 107 Fed. 114); *U. S. v. Given*, Fed. Cas. No. 15,210 (1873). So far as the writer's researches go, the case last cited is the only reported case, standing unreversed and not overruled, which necessarily involves the existence of the Fifteenth Amendment.

<sup>3</sup> *Scott v. Sandford*, 19 How. 616.



neous with the adoption of the Constitution," but originated nearly a hundred years after that time. Consequently, it cannot fairly be taken as of much weight with respect to the meaning of that instrument or of the proviso that no constitutional amendment shall deprive any state of its equal suffrage in the Senate without its own consent.

Moreover, the Fifteenth Amendment has never been acquiesced in unreservedly throughout the country. Indeed, it has never been loyally observed except in places where its effect was small. In large portions of the country it has been persistently evaded and overridden, now by force and now in other ways.

Finally, the argument based upon the construction of the Constitution by the legislative and executive departments is never controlling upon the courts. At least in respect to constitutional questions, it is not true that *communis error facit jus*, but at most *communis opinio* is evidence of what the law is.<sup>1</sup> The courts should never permit themselves to be influenced by such considerations unless, apart therefrom, the judicial mind is left in a state of doubt and indecision.

In the case now under consideration, the opinion of the legislative and executive departments at the time of the adoption of the Amendment is entitled to unusually little weight. It was a time of great excitement consequent upon a civil war and the assassination of the chief executive. Hearts beat hard and brains high-blooded ticked. The opponents of the measure were cowed and stupefied. The hour was not conducive to correct legal judgments — least of all, on the part of men active in politics.

## X.

The constitutional arguments of the minority in Congress in opposition to the passage of the Fifteenth Amendment were based upon the inherent limitations of the power of amendment;<sup>2</sup> and attention was not directed to the proviso guaranteeing to each state its equal suffrage in the Senate. Nevertheless several senators forcibly pointed out the necessary results of holding the Fifteenth Amendment to be within the power of amending the Constitution. For instance, Senator Saulsbury of Delaware said:

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<sup>1</sup> *Isherwood v. Oldknow*, 3 M. & S. 396.

<sup>2</sup> See *supra*, p. 171.

"If two thirds of Congress were to propose an amendment, and three fourths of the States were to ratify it, to blot out the State of Rhode Island and the State of Delaware, two of the smallest States in the Union, could you legitimately do so? Would it be a legitimate exercise of the power of amendment to destroy the members composing the Federal Union, to destroy the parties to the Federal Union? I presume that it will not be contended as possible.

"What is the difference when two thirds of the States propose and three fourths of the States ratify what they call an amendment which deprives the States of Delaware and Rhode Island of the exercise of authority within their own limits? . . .

"It is a perfectly legitimate mode of testing the soundness of a principle by carrying it out to its logical conclusions. If you have the authority to say who shall vote in a State, you have the authority to say who shall not vote in a State. If you have the authority to say who shall not vote in a State, you have the authority to say that no one shall vote in a State. . . . If you have that authority, you have the authority to say what shall be the law of that State; how that law shall be enacted; by whom the functions of government shall be exercised. If you can do that, you can go to the hub of the universe, this modern Athens, from whence comes all this modern illumination, and send some one of the wise men from the East to my State to do all the voting and hold all the offices." *Congressional Globe*, 40th Congress, 3rd Session, Appendix, p. 162.

If it be said that this is the argument from abuse of power — an argument which is generally recognized as dangerous — one may reply that the hypothetical cases put by Senator Saulsbury scarcely go beyond the actual results of the Fifteenth Amendment. What could be a stronger exercise of alleged power than to take a state government out of the hands of its citizens and give it over to a mass of persons who by its laws were mere chattels, were not its citizens, and did not form members of its body politic?

## XI.

The objections to the validity of the Fifteenth Amendment raised by this article might be obviated if its application within the states could be confined by construction to federal elections for members of the House of Representatives.<sup>1</sup>

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<sup>1</sup> Another construction, which would, if not obviate, at least render less formidable, the objections to the validity of the Amendment, would confine its operation to persons who have once acquired the right to vote under the state laws. This construction was



The words "privileges and immunities of citizens of the United States" in the Fourteenth Amendment have been held to mean such privileges and immunities as are enjoyed by virtue of citizenship in the United States and not to include privileges and immunities enjoyed by citizens of the United States as citizens of some particular state.<sup>1</sup> By parity of reasoning, should not the words the "right of citizens of the United States to vote" in the Fifteenth Amendment be held to include only any right to vote which may be enjoyed by citizens of the United States as such? It will be objected that this construction would deprive the words of all meaning, because citizens of the United States as such have no right to vote, that right being founded on state laws. The force of this objection must be admitted; but it may be pointed out that the right to vote for members of the House of Representatives does arise from the Constitution of the United States,<sup>2</sup> and perhaps may therefore more appropriately be designated as a "right of citizens of the United States" than the right to vote at state and municipal elections.

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advanced by counsel in *Anthony v. Halderman*, 7 Kan. 50, and has been very forcibly advocated by Judge Albion W. Tourgee in an article in *The Forum*, March, 1890, vol. 9, pp. 78-92. The objection to it is not so much the *dicta* to the contrary in *Ex parte Yarborough*, 110 U. S. 651, 664-665, and *Neal v. Delaware*, 103 U. S. 370, 389, as the contemporaneous practical construction of the Amendment as well by its opponents as by its friends.

<sup>1</sup> *Slaughter House Cases*, 16 Wall. 36.

<sup>2</sup> *Swafford v. Templeton*, 185 U. S. 487; *Wiley v. Sinkler*, 179 U. S. 58. It has, however, been held that the right to vote for presidential electors is not a privilege or immunity of citizens of the United States within the Fourteenth Amendment: *McPherson v. Blacker*, 146 U. S. 1, 37-39.

## WHAT LAW GOVERNS THE VALIDITY OF A CONTRACT.

### II. THE PRESENT CONDITION OF THE AUTHORITIES.

[Continued.]

*Michigan.*

IN most of the cases the place of making and of performance was the same, and that law was held to govern;<sup>1</sup> but in a few cases the place of contracting and of performance were different, and in these cases the court has held that the law of the place of performance necessarily applies.<sup>2</sup>

In the case of contracts attacked as usurious, however, the court applies the law of the place intended by the parties; being guided, it would seem, largely by the residence of the debtor, the *situs* of the security and the supposed desire of the parties that their transaction should be a legal one.<sup>3</sup>

But in a case where a note was made in Michigan on Sunday, payable in Ohio, it was held void according to the Michigan Sun-

<sup>1</sup> *Bissell v. Lewis*, 4 Mich. 450; *Collins Iron Co. v. Burkane*, 10 Mich. 283; *Clay F. & M. I. Co. v. Huron S. & L. M. Co.*, 31 Mich. 346; *O'Rourke v. O'Rourke*, 43 Mich. 58; *Voorhies v. Peoples' M. B. Soc.*, 91 Mich. 469; *Dawson v. Peterson*, 110 Mich. 431; *John A. Tolman Co. v. Reed*, 115 Mich. 71; *Palmer v. Hill*, 140 Mich. 468; *Stack v. Detour L. & C. Co.*, 151 Mich. 21; *Dolan v. Supreme Council*, 152 Mich. 266.

<sup>2</sup> *Strawberry Point Bank v. Lee*, 117 Mich. 122; *Barger v. Farnham*, 130 Mich. 487; *Douglass v. Paine*, 141 Mich. 485. In the last case the court said: "The rule that a contract is to be interpreted according to the law of the place where it is made is subject to the exception that, if by the terms or nature of the contract it appears that it was to be executed in another country then the place of making the contract becomes immaterial, and the law of the place where the contract is to be performed governs, in determining the rights of the parties, and if a contract is made in one state or country, and according to its terms is to be performed in another, it will be presumed that it was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation, and effect of the contract."

<sup>3</sup> *Mott v. Rowland*, 85 Mich. 561 ("the parties had an undoubted right to adopt the laws of either state, provided they did so in good faith"). *Nat. M. B. & L. Assoc. v. Burch*, 124 Mich. 57; *Hoskins v. Rochester S. & L. Assoc.*, 133 Mich. 505; *Cobe v. Summers*, 143 Mich. 117.



day law; the court saying that "parties cannot be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the state."<sup>1</sup>

### Minnesota.

The question has seldom arisen in this state. In case of a shipment of goods by carrier from Illinois to Minnesota it was assumed without argument that the law of Illinois applied to the contract of carriage.<sup>2</sup> And a contract for the sale of land in Colorado, which was made in Minnesota and provided for payments in the latter state, was held to be governed by the law of Minnesota, as the *lex loci contractus*, and not by the *lex rei sitae*.<sup>3</sup>

### Mississippi.

In cases where the contract was both made and to be performed in a foreign state, the law of that state of course governs.<sup>4</sup> Where the place of performance differs from the place of making, the law of the place of performance has usually been applied.<sup>5</sup> In the usury cases, however, this has been explained as due to the presumed intention of the parties; and where the application of the law of the place of making would enable the court to uphold the contract, that law has been adopted as the law intended.<sup>6</sup>

On the other hand, the law of the place of making has been applied without much consideration in one or two cases. Thus in case of a telegram sent from Massachusetts to Mississippi the law of Massachusetts was held to govern the legality of a limitation of liability;<sup>7</sup> and in case of a contract of sale made in Mississippi it was held that

<sup>1</sup> *Arbuckle v. Reaume*, 96 Mich. 243.

<sup>2</sup> *Powers M. Co. v. Wells*, 93 Minn. 143.

<sup>3</sup> *Finnes v. Selover*, 102 Minn. 334.

<sup>4</sup> *Ivey v. Lalland*, 42 Miss. 444; *Partee v. Silliman*, 44 Miss. 272; *Allen v. Bratton*, 47 Miss. 119; *McKee v. Jones*, 67 Miss. 405; *Hart v. Livermore F. & M. Co.*, 72 Miss. 809; *Ætna Ins. Co. v. Mount*, 45 So. 835.

<sup>5</sup> *Martin v. Martin*, 1 Sm. & M. 176; *Emanuel v. White*, 34 Miss. 56; *Coffman v. Bank of Kentucky*, 41 Miss. 212; *Harrison v. Pike*, 48 Miss. 46; *Lienkauf B. Co. v. Haney*, 46 So. 625. All these cases except the first arose on commercial paper.

<sup>6</sup> *Brown v. Freeland*, 34 Miss. 181; *Shannon v. Georgia S. B. & L. Assoc.*, 78 Miss. 955. But see *Brown v. Nevitt*, 27 Miss. 801, where the Mississippi law was applied to make void for usury a bill discounted in Mississippi.

<sup>7</sup> *Shaw v. Postal T. C. Co.*, 79 Miss. 670.

the Mississippi Sunday law applied.<sup>1</sup> A policy of insurance made in another state upon property in Mississippi was held not subject to the Mississippi law,<sup>2</sup> though an express provision of statute that all contracts of insurance on Mississippi property should be construed according to Mississippi law was of course enforced by the Mississippi court.<sup>3</sup>

### *Missouri.*

When the contract is made and to be performed in the same state, the contract is governed by the law of that state; and this is usually put on the ground that the law of the place of making governs.<sup>4</sup> And in many cases where the contract was made in one state and performable in another,<sup>5</sup> or made in one state and relating closely to another,<sup>6</sup> the law of the place of making has been applied. In a few cases this has been said to be the rule "ordinarily,"<sup>7</sup> or "unless the parties have in view some other law;"<sup>8</sup> but in other cases it is distinctly adopted as an absolute rule,<sup>9</sup> and in several cases where

<sup>1</sup> *Strouse v. Lancotot*, 27 So. 606.

<sup>2</sup> *Swing v. Brister*, 87 Miss. 516.

<sup>3</sup> *Fidelity M. L. I. Co. v. Miazza*, 46 So. 817.

<sup>4</sup> *Harley v. Stapleton*, 24 Mo. 248; *Golson v. Ebert*, 52 Mo. 260; *Stix v. Mathews*, 63 Mo. 371, 75 Mo. 96; *Johnston v. Gawtry*, 83 Mo. 339; *Thompson v. Traders' Ins. Co.*, 169 Mo. 12; *Tri-State A. Co. v. Forest Park H. A. Co.*, 192 Mo. 404; *Mercantants & M. I. Co. v. Linchey*, 3 Mo. App. 587; *Creston Nat. Bank v. Salmon*, 117 Mo. App. 506; *Standard Leather Co. v. Mercantile T. M. I. Co.*, 131 Mo. App. 701; *Tennent v. Union C. L. I. Co.*, 133 Mo. App. 345; *Roberts v. Modern Woodmen*, 133 Mo. App. 207. Where there is nothing to show where contract was made, the law of the forum is applied. *Flato v. Mulhall*, 72 Mo. 522.

<sup>5</sup> *Contracts of Carriage, etc.*: *Otis Co. v. Missouri P. Ry.*, 112 Mo. 622; *Reed v. Western U. T. Co.*, 135 Mo. 661; *Hartmann v. Louisville & N. R. R.*, 39 Mo. App. 88; *Crouch v. Louisville & N. R. R.*, 42 Mo. App. 248; *Nenno v. Chicago R. I. & P. R. R.*, 105 Mo. App. 540; *Townsend & W. D. G. Co. v. U. S. Exp. Co.*, 133 Mo. App. 683.

*Contracts of Sale*: *Houghtaling v. Ball*, 19 Mo. 84; *Edwards B. Co. v. Stevenson*, 160 Mo. 516; *Kerwin v. Doran*, 29 Mo. App. 397.

*Commercial Paper*: *F. B. Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 385; *Phoenix M. L. I. Co. v. Simons*, 52 Mo. App. 357.

<sup>6</sup> *Insurance Contracts*: *Daggs v. Orient I. Co.*, 136 Mo. 382; *Burridge v. New York L. I. Co.*, 211 Mo. 158; *Whittaker v. Mutual L. I. Co.*, 133 Mo. App. 664.

*Sale of Lottery Tickets*: *Roselle v. Farmers' Bank*, 141 Mo. 36.

<sup>7</sup> *Reed v. Western U. T. Co.*, 135 Mo. 661.

<sup>8</sup> *Otis Co. v. Missouri P. Ry.*, 112 Mo. 622.

<sup>9</sup> *Hartmann v. Louisville & N. R. R.*, 39 Mo. App. 88; *F. B. Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 385.



the parties provided in their agreement that the contract should be governed by another law, the court held that this could not be done.<sup>1</sup>

In the usury cases, however, the court appears (without citing the Missouri authorities just examined) to have held that the law of the place of performance governs,<sup>2</sup> subject however to the limitation that if the parties intended another law it will govern, and to the presumption that they intended the law that would make the contract valid.<sup>3</sup>

### *Nebraska.*

The law of the place of making has usually been applied to the validity of a contract.<sup>4</sup> But it appears to be the accepted doctrine that the parties may if they choose adopt in good faith the law of either the place of making or that of performance,<sup>5</sup> and in one case the latter law was on that ground held to govern the question of usury.<sup>6</sup>

### *New Hampshire.*

Where no place of performance different from the place of making is agreed upon, the contract is to be governed by the law of the place of making,<sup>7</sup> but where the parties agree on a place of performance, the court has held that the law of that place is to be applied.<sup>8</sup> Even in cases (like contracts of carriage) where the performance is

<sup>1</sup> *Cravens v. New York L. I. Co.*, 148 Mo. 583; *Horton v. New York L. I. Co.*, 151 Mo. 604; *Nichols v. Mutual L. I. Co.*, 176 Mo. 355; *Summers v. Fidelity M. A. Assoc.*, 84 Mo. App. 605.

<sup>2</sup> *Trower Bros. Co. v. Hamilton*, 179 Mo. 205; *Central N. Bank v. Cooper*, 85 Mo. App. 383.

<sup>3</sup> *Davis v. Tandy*, 107 Mo. App. 437.

<sup>4</sup> *Sands v. Smith*, 1 Neb. 108; *Olmstead v. N. E. Mtg. Co.*, 11 Neb. 493; *Joslin v. Miller*, 14 Neb. 91; *Tredway v. Riley*, 32 Neb. 495; *Bascom v. Zediker*, 48 Neb. 380; *Antes v. State Ins. Co.*, 61 Neb. 55; *Peoples' B. L. & S. A. v. Shaffer*, 63 Neb. 573; *National M. B. & L. Assoc. v. Retzman*, 69 Neb. 667; *Corn Exchange N. Bank v. Jansen*, 70 Neb. 579.

<sup>5</sup> *Security Co. v. Eyer*, 36 Neb. 507.

<sup>6</sup> *Coad v. Home Cattle Co.*, 32 Neb. 761.

<sup>7</sup> *Commercial Paper: Day v. Rowell*, 12 N. H. 49; *Watriss v. Pierce*, 32 N. H. 560; *Howard v. Fletcher*, 59 N. H. 151; *Fessenden v. Taft*, 65 N. H. 39; *New York L. I. Co. v. McKellar*, 68 N. H. 326.

*Policy of Insurance: Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291.

*Sale: Smith v. Godfrey*, 28 N. H. 379; *Bliss v. Brainard*, 41 N. H. 256; *Hill v. Spear*, 50 N. H. 253; *Lauten v. Rowan*, 59 N. H. 215.

<sup>8</sup> *Thayer v. Elliott*, 16 N. H. 102; *Hall v. Costello*, 48 N. H. 176; *Davis v. Aetna M. F. I. Co.*, 67 N. H. 218; *Limerick Nat. Bank v. Howard*, 71 N. H. 13.

to take place in two states, the court applies the law of that state in which the performance was taking place at the time of the breach in question.<sup>1</sup> In one usury case the right of the parties to choose either law was recognized.<sup>2</sup>

In the latest case, however, without fully arguing the question and without referring to the earlier authorities, the court held that so far as the nature and validity of a contract is concerned it is governed by the law of the place of making.<sup>3</sup>

### *New Jersey.*

Where no separate place of performance is named, or where the place of making and of performance are the same, the law of that place governs.<sup>4</sup> In a few cases the doctrine that where the places differ the law of the place of making governs appears to be accepted;<sup>5</sup> but the prevailing doctrine is that the law of the place of performance governs the nature and validity of the obligation.<sup>6</sup>

### *New York.*

Where a contract is expressly performable in the place where it is made, it is of course governed by the law of that place;<sup>7</sup> and the same is true where no place of performance is expressly named.<sup>8</sup>

<sup>1</sup> *Barter v. Wheeler*, 49 N. H. 9; *Gray v. Jackson*, 51 N. H. 9.

<sup>2</sup> *Townsend v. Riley*, 46 N. H. 300.

<sup>3</sup> *Seely v. Manhattan L. I. Co.*, 72 N. H. 49.

<sup>4</sup> *Bradley v. Johnson*, 46 N. J. L. 271; *Watson v. Lane*, 52 N. J. L. 550; *Roubicek v. Haddad*, 67 N. J. L. 522; *Allegheny Co. v. Allen*, 69 N. J. L. 270; *Orient Ins. Co. v. Rudolph*, 61 Atl. 26; *Irving N. Bank v. Ellis*, 64 Atl. 1071; *Knoup v. Carver*, 70 Atl. 660.

<sup>5</sup> *Columbia Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Atwater v. Walker*, 16 N. J. Eq. (1 C. E. Green) 42.

<sup>6</sup> *Ball v. Consolidated F. Co.*, 32 N. J. L. 102; *Campbell v. Nichols*, 33 N. J. L. 81; *Freese v. Brownell*, 35 N. J. L. 285 (all cases of commercial paper).

<sup>7</sup> *Thatcher v. Morris*, 11 N. Y. 437; *Cutler v. Wright*, 22 N. Y. 472; *Herdie v. Roessler*, 109 N. Y. 127; *Hutchinson v. Ward*, 192 N. Y. 375; *Hodges v. Shuler*, 24 Barb. 68; *Backman v. Jenks*, 55 Barb. 468; *Merchants' Bank v. Brown*, 86 App. Div. 599; *Parsons v. Teller*, 111 App. Div. 637; *Whitman v. Connor*, 40 N. Y. Super. 339; *Heidenheimer v. Mayer*, 42 N. Y. Super. 506; *Scott v. Pilkington*, 15 Abb. Pr. 280; *Merchants' Bank v. Southwick*, 67 How. Pr. 324; *Simpson v. Hefter*, 42 Misc. 482.

<sup>8</sup> *Barry v. Equitable L. A. Soc.*, 59 N. Y. 587; *Merchants' Bank v. Griswold*, 72 N. Y. 472; *Bath Gaslight Co. v. Rowland*, 178 N. Y. 631 (affirming 84 App. Div. 563); *Merchants' Bank v. Spaulding*, 12 Barb. 302; *Pomeroy v. Ainsworth*, 22 Barb. 118;



In only a few such cases was the question raised whether the law of one place or the other should govern.<sup>1</sup>

Where the place of contracting and of performance are different, the decisions are in great confusion. In several cases the law of the place of making has been applied;<sup>2</sup> in other cases, the law of the place of performance governs.<sup>3</sup> But the doctrine which is probably the prevailing one to-day is that the intention of the parties, so far as it is disclosed, must control.<sup>4</sup> This doctrine appears first to have been applied in usury cases, where it was held that the parties might choose the law either of the place of contracting or of the place of payment;<sup>5</sup> but the present rule seems to be that the law of

*Artisans' Bank v. Park Bank*, 41 Barb. 599; *Richardson v. Draper*, 23 Hun 188; *Western M. M. F. I. Co. v. Hilton*, 42 App. Div. 52; *Amsick v. Rogers*, 103 App. Div. 428; *Manhattan L. I. Co. v. Johnson*, 115 App. Div. 429; *Pool v. New Eng. M. L. I. Co.*, 123 App. Div. 885; *Swing v. Dayton*, 124 App. Div. 58; *Penox v. United Ins. Co.*, 3 Johns. Cas. 178; *Chapman v. Robertson*, 6 Paige 627; *Waldron v. Ritchings*, 9 Abb. Pr. N. S. 359; *Ball v. Davis*, 1 N. Y. St. R. 517.

<sup>1</sup> In *Western T. & C. Co. v. Kilderhouse*, 87 N. Y. 430, the court spoke of "the general rule of law," which makes the validity of a contract depend upon the law of the place in which it was made; and in *Northrup v. Foot*, 14 Wend. 248, the court asserted that a contract void by the law of the place of contracting could not be enforced anywhere. In *Milhouse v. Johnson*, 21 N. Y. St. R. 382, the court held that the assignability of a contract depended on the law of the place of making.

<sup>2</sup> *Wayne C. S. Bank v. Low*, 81 N. Y. 566 (explaining *Jewell v. Wright*, 30 N. Y. 259, and *Dickinson v. Edwards*, 77 N. Y. 573); *Staples v. Nott*, 128 N. Y. 403; *China M. I. Co. v. Force*, 142 N. Y. 90 (citing however with approval a passage from *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, in which the doctrine is limited to cases where the parties do not clearly manifest another intention); *Colonial Nat. Bank v. Duerr*, 108 App. Div. 215; *Daniels v. Rogers*, 108 App. Div. 338; *Hooley v. Talcott*, 129 App. Div. 233; *Le Baron v. Van Brunt*, 9 Daly 349; *Barnes v. Long Island R. R.*, 47 Misc. 318.

<sup>3</sup> *Everett v. Vendryes*, 19 N. Y. 436; *Jewell v. Wright*, 30 N. Y. 259; *Curtis v. Delaware, L. & W. R. R.*, 74 N. Y. 116; *Dickinson v. Edwards*, 77 N. Y. 578; *Williams v. Central R. R.*, 183 N. Y. 518, affirming 93 App. Div. 582; *Manhattan L. I. Co. v. Johnson*, 188 N. Y. 108; *Thompson v. Ketcham*, 4 Johns. 285, 8 Johns. 189; *Kentucky v. Bassford*, 6 Hill 526; *Abell v. Douglass*, 4 Den. 305; *Hosford v. Nichols*, 1 Paige 220; *Potter v. Tallman*, 35 Barb. 182; *Bright v. Judson*, 47 Barb. 29; *Hildreth v. Shepard*, 65 Barb. 265. In *Hyde v. Goodnow*, 3 N. Y. 266, the court said that this rule does not apply where the agreement was void where made; such an agreement can be enforced nowhere. In *Cappel v. Weir*, 46 Misc. 441, the court held that where the court of the place of performance would apply the law of the place of making, the latter law would be applied in New York. This is however a questionable doctrine.

<sup>4</sup> *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314; *Shillito v. Reineking*, 30 Hun 345; *Robertson v. National S. S. Co.*, 1 App. Div. 61.

<sup>5</sup> *Sheldon v. Haxtun*, 91 N. Y. 124; *Berrien v. Wright*, 26 Barb. 208; *Balme v.*

the place of contract governs, unless the parties clearly intended it to be governed by that of the place of performance.<sup>1</sup>

### *North Carolina.*

Where there is no place of payment stipulated which is different from the place of making, the law of the latter place governs.<sup>2</sup> Where the two places differ, some cases have applied the law of the place of making;<sup>3</sup> other cases lean to the law of the place of performance;<sup>4</sup> while the law as laid down in the latest case appears to be, that the parties may by agreement adopt the law of any place,<sup>5</sup> so long at least as they do so *bona fide*.<sup>6</sup>

### *North Dakota.*

The place of making and of performance being the same, its law governs the contract.<sup>7</sup> In a case involving the validity of a loan by a Minnesota corporation to a resident of North Dakota the court said that where the parties to a loan reside in different states it is competent for them to contract under the laws of either, and they will be presumed to contract under the law which makes the loan valid.<sup>8</sup>

Wombough, 38 Barb. 352; *Bowen v. Bradley*, 9 Abb. Pr. N. S. 395; *Weil v. Lange*, 6 Daly 549.

<sup>1</sup> *Grand v. Livingston*, 158 N. Y. 688, affirming 4 App. Div. 589; *Union Nat. Bank v. Chapman*, 169 N. Y. 538; *Valk v. Erie R. R.*, 130 App. Div. 446. In an earlier case, *Ruse v. Mutual B. L. I. Co.*, 23 N. Y. 516, the court presumed that the law of the place of performance was intended to govern.

<sup>2</sup> *Grace v. Hannah*, 6 Jones L. 94; *Satterthwaite v. Doughty*, Busb. 314; *Williams v. Carr*, 80 N. C. 294; *Commercial Nat. Bank v. Simpson*, 90 N. C. 467; *Armstrong v. Best*, 112 N. C. 59; *Horton v. Home Ins. Co.*, 122 N. C. 298; *Cannaday v. Atlantic C. L. R. R.*, 143 N. C. 439.

<sup>3</sup> *Hatcher v. McMorine*, 4 Dev. L. 122; *Taylor v. Sharp*, 108 N. C. 377. This view was taken in a later case, where damages were asked for failure to deliver a telegram. *Hall v. Western U. T. Co.*, 139 N. C. 369.

<sup>4</sup> *Morris v. Hockaday*, 94 N. C. 286; *Rowland v. Old Dominion Assoc.*, 115 N. C. 825.

<sup>5</sup> *Williams v. Neutral R. F. L. Assoc.*, 145 N. C. 128.

<sup>6</sup> *Meroney v. Atlanta N. B. & L. Assoc.*, 112 N. C. 842.

<sup>7</sup> *Travelers Ins. Co. v. California Ins. Co.*, 1 N. D. 151.

<sup>8</sup> *United States S. & L. Co. v. Shain*, 8 N. D. 136.



*Ohio.*

Where a contract is made and payable in the same state it is governed by the law of that state,<sup>1</sup> though the writing was in fact signed elsewhere<sup>2</sup> or the offer sent from another state.<sup>3</sup>

Where the places of making and performance differ, a few decisions in the inferior courts have referred the obligation to the law of the place of making;<sup>4</sup> but the doctrine which has finally been accepted is that the law of the place of performance governs the nature and validity of the obligation,<sup>5</sup> except in the case of usury, where the parties are allowed to accept the provisions of the law of either place,<sup>6</sup> and even, as it was held in one case, of the place where the debtor lived and made his bargain, though the note on which suit was brought was made and performable elsewhere.<sup>7</sup>

*Oklahoma.*

In the case of a telegraph message sent from the Indian Territory into Oklahoma it was held that the contract was to be governed by the law of the Indian Territory.<sup>8</sup>

*Pennsylvania.*

If the contract is expressly performable where made,<sup>9</sup> or no place of performance is named, and therefore it is performable where made,<sup>10</sup> it is governed by the law of that place, on the ground that the law of

<sup>1</sup> *Lonsdale v. Lafayette Bank*, 18 Ohio 126; *Lockwood v. Mitchell*, 7 Ohio St. 387; *Plant v. Mutual L. I. Co.*, 26 Ohio C. C. 499.

<sup>2</sup> *Smith v. Frame*, 3 Ohio C. C. 587.

<sup>3</sup> *Eureka Ins. Co. v. Parks*, 1 Cin. Sup. Ct. 574.

<sup>4</sup> *Conahan v. Smith*, 2 Disney 9; *Anderson C. D. Bank v. Turner-Looker Co.*, 2 Ohio N. P. 73; *Harrison v. Baldwin*, 5 Ohio C. C. 310.

<sup>5</sup> *Pittsburgh C. C. & S. L. Ry. v. Sheppard*, 56 Ohio St. 68; *Montana C. & C. Co. v. Cincinnati C. & C. Co.*, 69 Ohio St. 351; *Jacsonson v. Adams Exp. Co.*, 1 Ohio C. C. 381; *Curtis v. Hutchinson*, 1 Ohio Dec. (Repr.) 471, 10 West L. J. 134.

<sup>6</sup> *Kilgore v. Dempsey*, 25 Ohio St. 413.

<sup>7</sup> *Scott v. Perlee*, 39 Ohio St. 63.

<sup>8</sup> *Weston U. T. Co. v. Pratt*, 18 Okl. 274.

<sup>9</sup> *Jeter v. Fellows*, 32 Pa. 465; *Bennett v. Eastern B. & L. Co.*, 35 Atl. 684; *Spearman v. Ward*, 114 Pa. 634.

<sup>10</sup> *Dougherty v. Snyder*, 15 S. & R. 84; *Hardiman v. Fire Assoc.*, 212 Pa. 383; *Todd v. State Ins. Co.*, 11 Phila. 355; *Watt v. Gideon*, 22 Pa. Co. Ct. 499.

the place of performance governs.<sup>1</sup> And where the law of the place of making and that of the place of performance differ, the latter governs the obligation,<sup>2</sup> even in the case of a contract of carriage, where the performance begins at the place where the contract is made.<sup>3</sup>

### *Rhode Island.*

Where the contract was made and performable in the same place by its express terms,<sup>4</sup> and where no place of performance is named,<sup>5</sup> the contract has been held, without much discussion, to be governed by the law of that place. And where a note was dated in Rhode Island but delivered as a note in Massachusetts it was said, again without discussion of the point, to be a Massachusetts note and governed by the law of that state.<sup>6</sup> This seems to be an adoption of the law of the place of making as the law necessarily applicable to the contract.

### *South Carolina.*

The law of the place of performance is presumably the law that governs a contract; but if no place of performance is named it is performable at the place of making, and that law therefore governs.<sup>7</sup> But it is possible for the parties to contract with reference to the place of making, and the question whether they did so contract

<sup>1</sup> *Allshouse v. Ramsay*, 6 Whart. 331; *Clark v. Searight*, 19 Atl. 941; *Baum v. Birchall*, 150 Pa. 164; *Brewster v. Lyndes*, 2 Miles 185. See however *Hazelhurst v. Kean*, 4 Yeates 19.

<sup>2</sup> *Bennett v. Building & L. Assoc.*, 177 Pa. 233. The statement of the doctrine seems to rule out the possibility of the parties selecting any other law, even in a usury case. But see *Todd v. State Ins. Co.*, 11 Phila. 355, where the right of the parties to choose their law seems to be recognized.

<sup>3</sup> *Brown v. Camden & A. R. R.*, 83 Pa. 316; *Burnett v. Pennsylvania R. R.*, 176 Pa. 45; *Hughes v. Pennsylvania R. R.*, 202 Pa. 222 (explaining *Fairchild v. Philadelphia W. & B. R. R.*, 148 Pa. 527, and apparently overruling that case and *Brooke v. New York L. E. & W. R. R.*, 108 Pa. 529, where the law of the place of contracting was applied); *Merchants' Nat. Bank v. Shaw*, 2 W. N. C. 542; *Trexler v. Baltimore & O. R. R.*, 28 Pa. Super. 207. In *Hughes v. R. R.*, *supra*, the court said that in this respect the contract of carriage possibly differed from other contracts.

<sup>4</sup> *Leonard v. State M. L. A. Co.*, 27 R. I. 121; *In re Peckham*, 69 Atl. 1002.

<sup>5</sup> *Barrett v. Dodge*, 16 R. I. 740.

<sup>6</sup> *Winward v. Lincoln*, 23 R. I. 476.

<sup>7</sup> *Touro v. Cassin*, 1 Nott & McC. 173; *Curnow v. Phoenix Ins. Co.*, 37 S. C. 406; *Tillinghast v. Boston & P. R. L. Co.*, 39 S. C. 484; *Exchange Bank v. McMillan*, 76 S. C. 561; *Gallettey v. Strickland*, 74 S. C. 394.



may be determined either by their express stipulation<sup>1</sup> or by the circumstances.<sup>2</sup>

#### *South Dakota.*

The law of the place of performance is adopted by statute as the law governing a contract;<sup>3</sup> which of course in the case of a contract performable where it is made is the law of that place.<sup>4</sup> In the case of a contract of carriage, however, the law of the place of shipment appears to be adopted for determining the validity of a limitation of liability.<sup>5</sup>

#### *Tennessee.*

A contract made and payable in the same place is held to be governed by the law of that place without indicating whether the important circumstance is the making or the performance.<sup>6</sup> But in several cases where the place of payment did not appear the law of the place of making was held to govern;<sup>7</sup> and the same law has been applied in cases where the places of making and of performance were different.<sup>8</sup> In usury cases, however, the court allows the parties to choose the law either of the place of making or of the place of performance,<sup>9</sup> so long as it is done *bona fide*.<sup>10</sup>

#### *Texas.*

Where no place of performance appears the contract is to be governed by the law of the place of making.<sup>11</sup> When the making and the performance are in different states, the court in several cases

<sup>1</sup> *Equitable B. & L. Assoc. v. Corley*, 72 S. C. 404.

<sup>2</sup> *Thornton v. Dean*, 19 S. C. 583.

<sup>3</sup> *Barrey v. Stover*, 20 S. D. 459.

<sup>4</sup> *Warner v. Citizens' Bank*, 6 S. D. 152; *First Nat. Bank v. Doeden*, 21 S. D. 400.

<sup>5</sup> *Meuer v. Chicago M. & S. P. Ry.*, 5 S. D. 568.

<sup>6</sup> *Trabue v. Short*, 5 Cold. 293; *Lewis v. Woodfolk*, 2 Baxt. 25; *Robinson v. Queen*, 87 Tenn. 445; *Brady v. McGehee*, 1 Shann. Cas. 154; *Carnegie Steel Co. v. Chattanooga Const. Co.*, 38 S. W. 102.

<sup>7</sup> *King v. Doolittle*, 1 Head 77; *Smithwick v. Anderson*, 2 Swan 573; *Roberts v. Winton*, 100 Tenn. 484.

<sup>8</sup> *Elliott N. Bank v. Western & A. R. R.*, 2 Lea 676; *Gray v. Western U. T. Co.*, 108 Tenn. 39.

<sup>9</sup> *Senter v. Bowman*, 5 Heisk. 14; *Overton v. Bolton*, 9 Heisk. 762; *Sharp v. Davis*, 7 Baxt. 607.

<sup>10</sup> *Parham v. Pulliam*, 5 Coldw. 497.

<sup>11</sup> *Shelton v. Marshall*, 16 Tex. 344; *Fidelity M. L. Assoc. v. Harris*, 94 Tex. 25; *Merrielles v. Bank*, 5 Tex. Civ. App. 483.

(all involving the undertakings of carriers and telegraph companies) has applied the law of the place of making.<sup>1</sup> But the doctrine generally accepted is that the law *bona fide* selected by the parties will govern, which in the absence of evidence of other intent is that of the place of performance,<sup>2</sup> and the parties cannot *bona fide* agree upon any law except that either of the place of making or of the place of performance.<sup>3</sup>

#### Vermont.

The law of the place of making governs when the obligation is expressly payable there,<sup>4</sup> or where no place of payment is named.<sup>5</sup> Only one case has been found where a place of payment different from the place of making was expressly agreed upon; the maker of the note there in question was a corporation, and the question was, what was the liability of the shareholders. The court said that "though it may be true that the bill itself should be governed by the laws of the place where it is made payable," yet the liability of the stockholders must be determined by the law under which the corporation was formed, which was the place of making.<sup>6</sup>

#### Virginia.

The law of the place of performance is presumably the law intended by the parties, and the contract will be governed by that law.<sup>7</sup> If the parties expressly agree upon a law and declare that the contract is made with reference to it, effect will be given to their intention.<sup>8</sup>

<sup>1</sup> *Cantu v. Bennett*, 39 Tex. 303; *Western U. T. Co. v. Waller*, 96 Tex. 589; *Missouri P. Ry. v. Harris*, 1 Tex. App. Civ. Cas. § 1257; *Mexican N. R. R. v. Ware*, 60 S. W. 343; *Western U. T. Co. v. Cooper*, 29 Tex. Civ. App. 591; *Western U. T. Co. v. Buchanan*, 35 Tex. Civ. App. 437; *St. Louis S. W. Ry. v. McIntyre*, 36 Tex. Civ. App. 399.

<sup>2</sup> *Bullard v. Thompson*, 35 Tex. 313; *Ryan v. Missouri K. & T. Ry.*, 65 Tex. 13; *Seiders v. Merchants Life Assoc.*, 93 Tex. 194; *Metropolitan L. I. Co. v. Bradley*, 98 Tex. 230, affirming 79 S. W. 367; *Western U. T. Co. v. Blake*, 29 Tex. Civ. App. 224.

<sup>3</sup> *Connor v. Donnell*, 55 Tex. 167; *Dugan v. Lewis*, 79 Tex. 246.

<sup>4</sup> *Harrison v. Edwards*, 12 Vt. 648; *Emerson v. Patridge*, 27 Vt. 8.

<sup>5</sup> *Russell v. Buck*, 14 Vt. 147; *Adams v. Gay*, 19 Vt. 358; *Hartford S. B. I. & I. Co. v. Lasher S. Co.*, 66 Vt. 439; *Baker v. Spaulding*, 71 Vt. 169.

<sup>6</sup> *Cutler v. Thomas*, 25 Vt. 73.

<sup>7</sup> *Manhattan L. I. Co. v. Warwick*, 20 Gratt. 614; *National M. B. & L. Assoc. v. Ashworth*, 91 Va. 706; *Nickels v. People's Assoc.*, 93 Va. 380; *Ware v. Bankers' Co.*, 95 Va. 680; *Middle S. L. B. & C. Co. v. Miller*, 104 Va. 464.

<sup>8</sup> *Union C. L. I. Co. v. Pollard*, 94 Va. 146.



*Washington.*

While a contract is ordinarily governed by the law of the place where it is made and performable,<sup>1</sup> it is within the power of the parties by their express agreement to establish the place under whose laws it shall be construed.<sup>2</sup>

*West Virginia.*

Where a contract is not expressly performable elsewhere it is governed by the law of the place of contract;<sup>3</sup> and even where expressly payable elsewhere the law of the place of making is applied.<sup>4</sup>

*Wisconsin.*

Contracts performable where they are made are governed by the law of the place of making.<sup>5</sup> But where a contract is made payable in another place, the law of the place of payment ordinarily governs, as the law presumably intended by the parties;<sup>6</sup> though their intention to be governed by the law of the place of making may be shown by the circumstances, and will then be applied.<sup>7</sup> Where, however, the contract is performable partly at the place of making and partly elsewhere, the presumption favors the law of the place of making.<sup>8</sup>

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<sup>1</sup> *Wood v. Cascade F. & M. I. Co.*, 8 Wash. 427; *Bank v. Doherty*, 42 Wash. 317.

<sup>2</sup> *Griesemer v. Mutual L. I. Co.*, 10 Wash. 202.

<sup>3</sup> *Nichols v. Porter*, 2 W. Va. 13; *Klinck v. Price*, 4 W. Va. 4; *Pugh v. Cameron*, 11 W. Va. 523; *Shipman v. Bailey*, 20 W. Va. 140; *Galloway v. Standard F. I. Co.*, 45 W. Va. 237.

<sup>4</sup> *Floyd v. National L. & I. Co.*, 49 W. Va. 327; *Miller v. Prudential B. & T. Co.*, 63 W. Va. 107. In both these cases the law applied was a statute of the place of making which regulated the doing of business.

<sup>5</sup> *Kennedy v. Knight*, 21 Wis. 340; *Central Trust Co. v. Burton*, 74 Wis. 329; *Maynard v. Hall*, 92 Wis. 565; *Second Nat. Bank v. Smith*, 118 Wis. 18.

<sup>6</sup> *Shores Lumber Co. v. Stitt*, 102 Wis. 450; *Bartlett v. Collins*, 109 Wis. 477; *Brown v. Gates*, 120 Wis. 349. In *Seamans v. Knapp-Stout & Co.*, 89 Wis. 171, the law of the place of making was said to govern the contract; following and quoting *Scudder v. Union Bank*, 91 U. S. 406. But the case was disapproved in *Brown v. Gates*, *supra*.

<sup>7</sup> *Fisher v. Otis*, 3 Chand. 83, 3 Pin. 78; *Newman v. Kershaw*, 10 Wis. 333. In *Brown v. Gates*, 120 Wis. 349, the fact that the law of the place of performance made the contract void, while that of the place of making made it valid, was held not of itself a circumstance sufficient to overcome the presumption.

<sup>8</sup> *Davis v. Chicago M. & S. P. R. R.*, 93 Wis. 470; *Bartlett v. Collins*, 109 Wis. 477.

*Summary.*

It is not easy to deduce from these confused and conflicting decisions any satisfactory conclusion as to the rule or rules favored by authority. A few things may, however, be pointed out.

First, it is to be noticed that courts who are uttering their instinctive views, the expression of their general knowledge of legal principle uninfluenced by authority, invariably speak of the law of the place of contracting as the law that governs. So strong is this feeling, that the form of statement of a different rule often shows its influence. Thus Story, holding the view that the law of the place of performance governs, nevertheless states it as an exceptional rule: as a general principle the law of the place of making governs, but there is an exception where the contract is to be elsewhere performed. To the instinctive acceptance of this general principle we must also refer the curious notion that the place of contracting may mean either the place of making or the place of performance of the contract, thus bringing the rule which applies the law of the place of performance within the general principle that the *lex loci contractus* governs.

A second point to be noticed is that the adoption of any other rule than that of the place of making is to be referred definitely to the authority of one man. The rule that the intention of the parties shall govern, either laid down in this simple form or coupled with some legal presumption as to the intention, may be directly traced back, through the early American cases or the English cases, to the *dictum* of Lord Mansfield in *Robinson v. Bland*,<sup>1</sup> and, as has been seen, was derived by him from the doctrines of the civil law. The other rule, that the law of the place of performance governs, may be traced directly to the statement of Story in his *Conflict of Laws*,<sup>2</sup> often repeated verbatim in the cases; and it was on his part a restatement of an opinion he expressed in the case of *Reimsdyk v. Kane*.<sup>3</sup> It appears to have been based on some of the language in *Robinson v. Bland*,<sup>1</sup> on which he put an interpretation differing from that ordinarily adopted. The statement in that case that the law of England, the place of performance, governed as the law intended by

<sup>1</sup> 2 Burr. 1077.

<sup>2</sup> Sec. 280.

<sup>3</sup> 1 Gall. 371, 375.



the parties to govern has thus formed the basis for two rules: one, that the law intended by the parties governed, it being in that case merely an accidental circumstance that the law of the place of performance was intended; the other, that the law of the place of performance always governs, the reason given being that in the view of the law parties always intend their contract to be governed by the law of the place of performance.

Finally, the present tendency, greatly stimulated by the late English and Federal cases, is toward the adoption of the law intended by the parties. Though the greater number of states still profess adherence to Judge Story's rule, it is being superseded by the other; and ultimately the American jurisdictions will divide in their adherence between the law of the place of making and the law intended by the parties.

It may be worth while, before leaving this part of the subject, to enumerate the states which apparently accept one or another of the principal rules. It must be pointed out that in several states the question appears not to have arisen; in others, the decisions or *dicta* are not sufficiently clear to justify including the state in either list. So far as one can determine the prevailing rule, the grouping seems to be as follows:

States adopting the law of the place of making: Colorado, Indiana, Maryland (?), Massachusetts, Tennessee, West Virginia.

States adopting the law of the place of performance: Alabama, Arkansas (?), California (?), Georgia, Iowa, Kansas, Kentucky, Louisiana (?), Maine (?), Mississippi, Michigan, New Hampshire (?), New Jersey, Ohio, Pennsylvania, South Dakota.

States adopting the law intended by the parties: England and the English colonies, Connecticut,<sup>1</sup> District of Columbia, Illinois, Nebraska, New York, North Carolina, North Dakota, South Carolina,<sup>1</sup> Texas,<sup>1</sup> Virginia,<sup>1</sup> Washington, Wisconsin; and, in usury cases, also the Federal courts, Alabama, Georgia, Kansas, Missouri, Mississippi, Ohio, and Tennessee.

In making any such classification of jurisdictions it is impossible to feel confident of one's accuracy. The failure of the courts in most cases to realize that the various rules represent conflicting doctrines and not mere differences in forms of statement has often led courts to apply different rules in successive cases without meaning to

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<sup>1</sup> Presumably, in these States, the law of the place of performance.

depart from precedent; and the confusion between intended interpretation and intended obligation, between presumption of law and presumption of fact, and between execution of a promise and execution (by performance) of an obligation have led to a deep-seated confusion as to applicable law. But the classification made is submitted as on the whole probably not far from correct.

*Joseph H. Beale.*

CAMBRIDGE, MASS.

[*To be continued*]



# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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THE STANDARD OIL CASE AND THE SHERMAN ACT. — In a recent decision of the Circuit Court, important rather for its affirmation of principles already established in previous cases under section 1 of the Sherman Act than for any new propositions laid down, the Standard Oil Company of New Jersey is declared a combination in restraint of trade and a monopoly within sections 1 and 2 of the Sherman Act.<sup>1</sup> *U. S. v. Standard Oil Co. of N. J.*, 173 Fed. 177 (Circ. Ct., E. D. Mo., Nov. 20, 1909). For the determination of the legality of the combination under section 1 the common-law test of reasonableness<sup>2</sup> is disregarded in favor of that of directness: whether the necessary effect of the combination is directly or merely incidentally to restrict competition in interstate commerce.<sup>3</sup> The exchange of stock of competitive corporations for the stock of a single corporation, where the substance of the transaction is simply a change in the form of investment and not an outright purchase for cash or its equivalent,<sup>4</sup> has

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<sup>1</sup> 26 U. S. Stat. at L. 209, § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor."

§ 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

<sup>2</sup> As to this test see *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290; *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610; 17 HARV. L. REV. 480.

<sup>3</sup> As to the application of this test see *Hopkins v. U. S.*, 171 U. S. 578; *Swift & Co. v. U. S.*, 196 U. S. 375; 22 HARV. L. REV. 216.

<sup>4</sup> Where the transaction constitutes an outright sale of a business it is not within the Sherman Act. *Davis v. Booth*, 131 Fed. 31, 36. See 19 HARV. L. REV. 472.

already been held an illegal combination within section 1 of the Act.<sup>5</sup> *A fortiori* a combination is illegal in which the holding company is itself one of the formerly competing corporations.<sup>6</sup> This being the situation in the present case, there has clearly been a violation of section 1 of the Act.

Stress is laid by counsel for the defendant on the fact that the majority stock of the nineteen principal subsidiary companies was previously held in joint ownership, so that these corporations had not been actual competitors for a time long prior to the passing of the Act.<sup>7</sup> The court, however, considers that under this joint ownership they were potentially competitive; and that since there is much less probability of their separating and becoming again actually competitive when the stock is held by a single corporation than when held in joint ownership by individuals, the combination is in direct restraint of trade. That the mere vesting of the power to prevent competition, without exercise of that power, is within the prohibition of the Act has already been determined.<sup>8</sup>

For the decision of the majority of the cases under the Sherman Act, as in the present case, it has been sufficient to find the defendant guilty of a violation of section 1. But as the violation of section 2 is a separate offense,<sup>9</sup> the discussion in the main case of what constitutes a monopoly under that section is of interest. As yet there has been no authoritative construction of section 2 by the Supreme Court, and few direct decisions in the circuit courts.<sup>10</sup> Monopolization, as covered by this section, has been held to embrace two elements: the exclusive right to, or control of trade, and the exclusion of others from that right or control.<sup>11</sup> Furthermore, it is agreed that the monopoly need not be complete.<sup>12</sup> The suggestion that, as with a combination under section 1, its necessary effect must be directly, not incidentally, to restrict commerce, aids but little in the determination of its legality.<sup>13</sup> Nor is the mere magnitude of the business a guiding test.<sup>14</sup> It is submitted that the legality of a monopoly must depend upon the character of the means used in its establishment. The acquisition of control of interstate commerce by ordinary legitimate methods of business is not illegal.<sup>15</sup> On the other hand, a monopoly falls within the

<sup>5</sup> Northern Securities Co. v. U. S., 193 U. S. 197.

<sup>6</sup> U. S. v. American Tobacco Co., 164 Fed. 700; Bigelow v. Calumet & Hecla Mining Co., 155 Fed. 869.

<sup>7</sup> A trust in which the ownership of the majority of these corporations was vested had been formed as early as 1879.

<sup>8</sup> Northern Securities Co. v. U. S., *supra*, as explained in Harriman v. Northern Securities Co., 197 U. S. 244, 291.

<sup>9</sup> U. S. v. MacAndrews & Forbes Co., 149 Fed. 836.

<sup>10</sup> For a discussion of the early authorities under this section see 7 HARV. L. REV. 338, 352.

<sup>11</sup> *In re Greene*, 52 Fed. 104, 115; U. S. v. Trans-Missouri Freight Assoc., 58 Fed. 58, 82.

<sup>12</sup> See Bigelow v. Calumet & Hecla Mining Co., *supra*.

<sup>13</sup> It was so suggested in Whitwell v. Continental Tobacco Co., 125 Fed. 454, 462.

<sup>14</sup> See *In re Greene*, *supra*.

<sup>15</sup> Thus the following transactions have been held unobjectionable under section 2 of the Sherman Act: the arbitrary fixing of prices, Dueber Watch Case Mfg. Co. v. Howard Watch Co., 55 Fed. 851; mutual agreements not to do business with persons dealing with a certain competitor, *Ibid.*; agreements to give rebates for maintenance of list prices and exclusive trade, *In re Corning*, 51 Fed. 205; *In re Greene*, *supra*; the restriction of trade to those who refrain from dealing with competitors, Whitwell v. Continental Tobacco Co., *supra*.



meaning of section 2 of the Act when it has been secured by methods contrary to common law<sup>10</sup> or statute. Accordingly a "contract, combination, or conspiracy" in restraint of interstate commerce illegal under section 1 of the Act should constitute such unlawful means as to bring any resulting monopoly within the prohibition of section 2. And as the court is undoubtedly correct in holding that there has been in the present case an illegal combination under section 1, their further conclusion that the defendants are also guilty of a violation of section 2 seems therefore logically to follow.

INTENTION REQUISITE TO EFFECT A CHANGE OF DOMICILE. — Less than a century ago doubt was expressed whether an Englishman could by any acts and intentions change his English domicile;<sup>1</sup> but this doubt was speedily put an end to by the ecclesiastical courts by whom it had first been voiced.<sup>2</sup> A generation later it was laid down that for a change of domicile there must be a change of nationality; that is, an Englishman, to acquire a French domicile, must live in France with intent to become a Frenchman.<sup>3</sup> But these strong expressions were presently given a mild interpretation;<sup>4</sup> and it is now clear law that domicile may be abandoned although nationality is retained.<sup>5</sup> Some English authority<sup>6</sup> turned with approval to the Scotch doctrine that for change of domicile there must be an intent to acquire a new civil status;<sup>7</sup> that is, an Englishman in France might acquire a French domicile only by a conscious though, it might be, unexpressed choice of French law. But as the deliberate rejection and selection of systems of law is obviously rare among laymen, it is not unfortunate that this doctrine was subsequently denied.<sup>8</sup> An eminent text-writer,<sup>9</sup> however, revised and revived it, citing authority<sup>10</sup> for the proposition that a man may change his domicile only by a conscious choice of foreign law or by action necessarily involving an unconscious choice. But that such theory is not the present English law, its learned proponent himself has very recently admitted.<sup>11</sup> Under the modern decisions there is a change of domicile whenever there is a change of residence to any Christian country, concurring with an intent that the change be permanent.<sup>12</sup>

This latest English test for change of domicile has been adopted by many cases in this country.<sup>13</sup> By others a variety of rules have been pro-

<sup>10</sup> Thus threats, intimidation, and violence are unlawful common-law means. *U. S. v. Patterson*, 55 Fed. 605, 641.

<sup>1</sup> *Curling v. Thornton*, 2 Add. 6.

<sup>2</sup> *Stanley v. Bernes*, 3 Hagg. Eccl. 373.

<sup>3</sup> *Moorhouse v. Lord*, 10 H. L. Cas. 272.

<sup>4</sup> *Udny v. Udny*, L. R. 1 Scotch App. 441.

<sup>5</sup> *Brunel v. Brunel*, L. R. 12 Eq. Cas. 298.

<sup>6</sup> *Attorney-General v. Countess de Wahlstatt*, 3 H. & C. 374.

<sup>7</sup> *Donaldson v. McClure*, 20 D. (Scotch Sess. Cas., 2d ses., 1857) 307.

<sup>8</sup> *Douglas v. Douglas*, L. R. 12 Eq. Cas. 617.

<sup>9</sup> *Westlake*, Priv. Int. L., 4 ed., § 256, (3).

<sup>10</sup> *Sharpe v. Crispin*, L. R. 1 P. & D. 611.

<sup>11</sup> *Westlake*, Priv. Int. L., 4 ed., § 256, (3).

<sup>12</sup> *Lord v. Colvin*, 4 Drew. 366; *Winans v. Attorney-General*, [1904] A. C. 287.

<sup>13</sup> *The Venus*, 8 Cranch 253; *Carey's Appeal*, 75 Pa. St. 201. The only reflection found of the older English requirements of intent to change nationality or status is in *Dupuy v. Wurtz*, 53 N. Y. 556.

pounded: that there must be an intent to remain merely an unlimited time,<sup>14</sup> or an indefinite time,<sup>15</sup> or even a definite period if reasonably long.<sup>16</sup> A number of courts have defined the intent necessary no more minutely than as the intent to found a new home.<sup>17</sup> This test as matter of law reconciles all the others; for under it the varying criteria of permanence, indefiniteness, and the like, are nothing more than differences of opinion as to what in fact constitutes the intent to found a home.<sup>18</sup>

A recent case decides that an American residing permanently in a Chinese treaty port obtains a Chinese domicile. *Mather v. Cunningham*, 3 Am. Journ. Int. L. 752 (Me., Sup. Ct., Apr. 15, 1909). An English case cited in the opinion holds on similar facts against a change of domicile, on the grounds that no Christian can desire to become a Chinese, or subject himself to Chinese laws; and that the existence of extraterritorial courts is the best proof of these inferences.<sup>19</sup> The inferences, indeed, require no proof; but under general principles they seem quite irrelevant. As has been said, the present English law requires for change of domicile intent neither to acquire a new nationality nor a new status. Nor does the situation demand a special principle. For on any theory Europeans in a treaty port are tried under Occidental systems in consular courts; so that there is here not even the ordinary objection to a change of legal home, that it involves an abandonment of home law. The Maine court is accordingly to be commended for declining to recognize in a complicated topic a new and unnecessary complication.

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RIGHT OF A COMMON CARRIER TO REFUSE SERVICE OWING TO THE NATURE OF THE GOODS. — The liability of a common carrier is twofold. Owing to the public character of his employment he is under a duty to serve all, without discrimination, to the extent of his profession; and because he has assumed a profession which in early times was hazardous, he is liable as insurer of objects carried,<sup>1</sup> except in the case of passengers, animals, and articles subject to inherent vices.<sup>2</sup> The courts speak of the latter ob-

<sup>14</sup> *Mitchell v. United States*, 21 Wall. 350; *Guier v. O'Daniel*, 1 Binn. (Pa.) 349 n.

<sup>15</sup> *Venable v. Paulding*, 19 Minn. 488. In *Attorney-General v. Pottinger*, 6 H. & N. 733, Bramwell, B., accepted as the test for change of domicile, the intent to remain an indefinite time. But this was not followed in later English decisions. Very similar to the intent to remain an indefinite time is the intent to remain indefinitely, which is regarded as essential in *Concord v. Rumney*, 45 N. H. 423.

<sup>16</sup> *Gilman v. Gilman*, 52 Me. 165.

<sup>17</sup> *White v. Brown*, 1 Wall. Jr. C. Ct. 217.

<sup>18</sup> Where different expressions are so common, it is hard to speak of the weight of authority. But it is conceived that the courts in most of the states will usually find a change of domicile in the case of any one intending to set up a new home. This tendency is more pronounced as to changes of municipality than of state. *Wilbraham v. Ludlow*, 99 Mass. 587.

<sup>19</sup> *In re Tootal's Trusts*, 23 Ch. Div. 532.

<sup>1</sup> *Citizens Bank v. Nantucket Boat Co.*, 2 Story (Mass.) 16, 33; *Johnson v. Midland Ry. Co.*, 4 Exch. 367; *Wilsons v. Hamilton*, 4 Oh. 722. See also 11 HARV. L. REV. 158, 164.

<sup>2</sup> *Clark v. McDonald*, 4 McCord (S. C.) 223; *Blower v. Great Western Ry. Co.*, L. R. 7 C. P. 655; *Clarke v. Ry. Co.*, 14 N. Y. 570. It is often said that carriers of live-stock are insurers not liable for injuries due to the propensities of the animals. *Chi. & Louisville Ry. Co. v. Woodward*, 164 Ind. 360; *Lewis v. Pa. Ry. Co.*, 70 N. J. L. 132.



ligation as the "liability of a common carrier"; but the truth is that whether he is responsible as an insurer or not, a carrier is a common carrier if his undertaking is to serve all comers. He is so by reason of his profession and not because of his responsibility.<sup>3</sup> In analyzing the cases it is important to notice to which "liability as common carrier" the courts hold the carrier. Decisions which declare a common carrier liable as insurer of certain goods involve the determination of his duty to carry such goods for all, because of his public employment; but the converse proposition is not necessarily true.<sup>4</sup>

Where a carrier's charter is permissive, his duty to carry is confined to such property as he expressly or impliedly professes to transport.<sup>5</sup> His undertaking may be to carry merchandise, passengers, and money; or it may be limited to one or more of these classes, in which case he cannot be compelled to carry the others.<sup>6</sup> Thus an express company must carry money but need not carry live-stock or other unwieldy goods;<sup>7</sup> and a carter need accept only goods adapted to his facilities which, of course, limit his profession.<sup>8</sup> No ordinary carrier need transport dangerous articles or goods of a fragile nature; for public policy, which justifies the regulation of carriers, does not sanction the imposition of undue risk.<sup>9</sup> On the other hand it is settled that a railroad must carry perishable goods if properly packed<sup>10</sup> and must accept live-stock for carriage.<sup>11</sup> It is doubtful whether the transportation of ordinary merchandise should commit a railroad to the carriage of animals, which fall more logically under the passenger class. The later decisions, however, reflect a tendency to enlarge the duties of railroads on the ground that they are created for the purpose of carrying all kinds of property which the common law permitted to be carried in any mode.<sup>12</sup> But by professing to carry one class of goods a carrier should not fear being compelled to carry any other.

In undertaking to carry a particular class of goods a common carrier must accept all goods not fundamentally different in character. The earlier view, which still prevails in England, was that the right to discriminate within a class is determined by the impression given the public.<sup>13</sup> In this country, however, the logic of public profession is not carried so far. Accordingly, a carrier of valuables must carry money, and a truckman professing to carry heavy things must carry machinery.<sup>14</sup> But in a recent

<sup>3</sup> *Ry. Co. v. Lockwood*, 17 Wall. 357.

<sup>4</sup> *Cf. Pittsburgh & St. Louis Ry. Co. v. Morton*, 61 Ind. 539.

<sup>5</sup> *Citizens Bank v. Nantucket Boat Co.*, *supra*.

<sup>6</sup> *Citizens Bank v. Nantucket Boat Co.*, 5 Fed. Cas. 2730; *Pfister v. Central Pac. Ry. Co.*, 70 Cal. 169; *Pender v. Robbins*, 51 N. C. 207.

<sup>7</sup> *Platt v. Lecocq*, 158 Fed. 723; *U. S. Express Co. v. Burke*, 94 Ill. App. 420.

<sup>8</sup> *Tunnel v. Pettijohn*, 2 Harr. (Del.) 48.

<sup>9</sup> *Walker v. Babcock*, 16 Hun 313; *California Powder Works v. Atlantic & Pac. Ry. Co.*, 113 Cal. 329; see also *Alston v. Herring*, 11 Exch. 822.

<sup>10</sup> *Baker v. B. & M. Ry. Co.*, 74 N. H. 100. A carrier may make reasonable regulations as to packing. *Elgin Ry. Co. v. Machine Co.*, 98 Ill. App. 331; *Boyd v. Moses*, 7 Wall. 316.

<sup>11</sup> *Kansas Pacific Ry. Co. v. Nichols*, 9 Kan. 235; *Cooper v. R. & G. Ry. Co.*, 110 Ga. 659; *contra*, *Mich. Ry. Co. v. McDonough*, 21 Mich. 165. But a carrier need not carry wild animals. See *Coup v. Wabash Ry. Co.*, 56 Mich. 111.

<sup>12</sup> *Baker v. B. & M. Ry. Co.*, *supra*; *Kansas Pacific Ry. Co. v. Nichols*, *supra*.

<sup>13</sup> *Johnson v. Midland Ry. Co.*, *supra*; *Leonard v. Am. Express Co.*, 26 Upp. Can. Q. R. 533.

<sup>14</sup> *Iron Works v. Hurlbut*, 36 N. Y. Supp. 808; *News Publishing Co. v. Southern Ry. Co.*, 110 Tenn. 684.

decision it was held that an express company undertaking to carry merchandise C. O. D. may nevertheless refuse to carry liquor in that way. *Burk v. Platt*, 172 Fed. 777 (Circ. Ct., N. D., W. Va.). This, however, does not conflict with the general American doctrine. A common carrier has a common-law right to insist on prepayment of charges; and it makes no difference that he extends credit to certain shippers.<sup>15</sup> It might be argued that express companies in professing to carry all merchandise C. O. D. have waived their common-law right. But public policy hardly justifies the imposition of this additional burden, and it is safe to say that a carrier may discriminate, as to C. O. D. shipments, not only between commodities but also between persons.

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CREATION OF JOINT TENANCIES. — In joint tenancy each co-owner is possessed of the whole subject to the others' interests; tenants in common hold distinct, although undivided, parts. The great practical difference between the two forms of collective ownership is that on the death of a joint tenant the survivors hold the *res* free of the interest of the deceased; while on the death of a tenant in common the property passes to his representatives just as would any other property. Of these forms, tenancy in common is the more in accord with ancient custom. And it seems not unlikely that down to the time of Bracton<sup>1</sup> a conveyance to several, in the absence of special facts, created a tenancy in common. Such an interest in real property imposed upon each tenant the incidents of tenure as to his share; and the courts came to feel that in construing limitations as tenancies in common they were not benefiting the holders of the property.<sup>2</sup> The general rule in favor of such construction accordingly fell; and as it was at first replaced by no other, the judges for a time probably applied no definite principle to the cases as they arose.<sup>3</sup> But when Littleton wrote, the new general rule had developed, that a conveyance to two or more created a joint tenancy unless the instrument itself showed an intent that the enjoyment be several.<sup>4</sup>

The substantial disappearance of the incidents of tenure took from joint tenancy its claim to the favor of the judges. And although the rule of Littleton held its own alike for real and personal estates and for choses in action, the courts became increasingly liberal in finding words of severance.<sup>5</sup> This liberality was somewhat more marked in equity than at law,<sup>6</sup> and perhaps also more marked, both at law and in equity, as to convey-

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<sup>15</sup> *Danciger v. Wells Fargo*, 154 Fed. 379; *Southern Indiana Express Co. v. U. S. Express Co.*, 92 Fed. 1022.

<sup>1</sup> Lib. 5, 375 a.

<sup>2</sup> 2 Bl. Comm. 193.

<sup>3</sup> Fleta's apparent inconsistency with himself (lib. 3, cap. 4, § 2, and lib. 3, cap. 4, § 7) and with Britton (Bk. I, Ch. IV, 6) is probably to be explained on the theory that at the end of the thirteenth century the law on the point was unsettled. See discussions of these early authorities in Wythe (Va.) 377 n. (58) and in 13 Sol. J. 885.

<sup>4</sup> Co. Litt. § 283.

<sup>5</sup> In the notes to *Morley v. Bird*, 3 Ves. 628, in Tudor, Lead. Cas. in Real Prop., 4 ed., 271-277, and 281-286, is an exhaustive discussion of the effect of particular phrases in creating joint tenancies and tenancies in common.

<sup>6</sup> *Fleming v. Fleming*, 5 Ir. Ch. 129.



ances by use<sup>7</sup> or devise<sup>8</sup> than as to conveyances by the common-law methods. Sporadic *dicta* raised<sup>9</sup> and left unsettled<sup>10</sup> the problem of the effect of a conveyance to A and B, "their executors, administrators and assigns." In a recent decision this form of words is held to be indistinguishable from a transference to A and B without more, and accordingly to create a joint tenancy. *Goddard v. Lewis*, 25 T. L. R. 813 (Eng., K. B. D., July 31, 1909). The result is admittedly unfortunate: that the purchasers of the term did not contemplate a right to the whole in the survivor is undoubted. And to attain its conclusion the court is driven to regard the naming of the personal representative as for all purposes surplusage.<sup>11</sup> But it is true that the purpose of naming the executors was the limitation of the estate granted, and not the determination of the type of collective interest created; so that the doctrine of a technical decision reduces itself to a highly technical rule, that words of severance must profess to be such.

It is probable that nowhere in this country, at least as to interests in land, would the decision in the principal case have been reached. In one or two jurisdictions the courts without legislative aid have either limited<sup>12</sup> or denied<sup>13</sup> the English presumption in favor of joint tenancies; and in Connecticut, which accepted the presumption, the right of survivorship has been rejected.<sup>14</sup> For the most part, however, the courts of this country have followed the English decisions.<sup>15</sup> But legislation has now everywhere either reversed the English presumption,<sup>16</sup> or abolished the right of survivorship,<sup>17</sup> or altogether done away with joint tenancies.<sup>18</sup>

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EFFECT OF REVOCATION OF PROBATE UPON RIGHTS OF LEGATEES. — A legatee's title to specific property bequeathed to him is said to relate back, upon the assent of the executor, and to vest in him as of the time of the testator's death.<sup>1</sup> If, then, after final settlement of the estate, a codicil is discovered and admitted to probate, revoking a legacy of certain shares of stock to A and bequeathing them to B, the title vested in B by the executor's assent covers, by relation back, the entire period during which the shares have been held by A. Since A has thus received what rightfully

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<sup>7</sup> *Rigden v. Vallier*, 2 Ves. 252.

<sup>8</sup> *Fisher v. Wigg*, 1 P. Wms. 14.

<sup>9</sup> *Crooke v. De Bandes*, 9 Ves. Jr. 197, 204; *Jackson v. Jackson*, 9 Ves. Jr. 591, 595.

<sup>10</sup> As reported in *Moseley*, 184, *Cray v. Willis* is a square decision for holding a joint tenancy on these facts; but in the report in 2 P. Wms. 529, the crucial words "and executors" do not appear.

<sup>11</sup> Cf. on this point the ingenious article in 3 Law Stud. Mag. (N. S.) 324 anticipating the facts of this case and contending for a result opposite to the actual one.

<sup>12</sup> *Martin v. Smith*, 5 Binn. (Pa.) 16.

<sup>13</sup> *Vreeland v. Van Ryper*, 17 N. J. Eq. 133.

<sup>14</sup> *Phelps v. Jepson*, 1 Root (Conn.) 48.

<sup>15</sup> *Decamp v. Hall*, 42 Vt. 483; *Farr v. Trustees of Grand Lodge, etc.*, 83 Wis. 446.

<sup>16</sup> Cf. *Birdseye Rev. Stat. (N. Y.)* 3023. This is the most common form of legislation on the subject.

<sup>17</sup> Cf. *Virginia Code*, § 2430. The earliest of such statutes was doubtless that of the Plymouth Colony passed in 1643. See *Plymouth Colony Laws*, ed. 1836, 75.

<sup>18</sup> Cf. *Georgia Code*, § 3142. In jurisdictions of this type an attempted joint tenancy is declared a tenancy in common.

<sup>1</sup> See *Saunders' Case*, 5 Coke 12 a, 12 b.

belongs to B, who has no remedy against the innocent executor;<sup>2</sup> the situation is analogous to that where one of two legatees has been fully paid out of assets insufficient to satisfy both,<sup>3</sup> and the executor is insolvent;<sup>4</sup> accordingly, if the shares are still in A's possession, B should be allowed in equity to compel A to give them up.<sup>5</sup>

A recent case goes still farther, allowing B to recover from A all dividends received by the latter on the stock. *West v. Roberts*, [1909] 2 Ch. 180. The law in England is that a residuary or general legatee who is obliged to refund is generally not chargeable with interest;<sup>6</sup> but in this country at least one court has said that interest as well as principal must be refunded.<sup>7</sup> The case of a specific legacy is a stronger one: unlike that of a general or residuary legatee,<sup>8</sup> the specific legatee's right is clear-cut and defined, so that it will support an action at law immediately upon the assent of the executor.<sup>9</sup> And title to the shares must carry with it title to the dividends. It does not follow, however, that under all circumstances A should be made to account for these dividends. If he has spent the income and has no tangible property to show for it, the court in forcing him to account would be invoking the fiction of relation back to the impoverishment of one who acted innocently in pursuance of judicial authority.<sup>10</sup> Prior to the revocation of the original probate, legal title is indisputably in A,<sup>11</sup> so that if he has sold to a *bonâ fide* purchaser the title of the latter could not be impeached.<sup>12</sup> A, therefore, has innocently but gratuitously acquired legal title to property which of right belongs to B. The resemblance of his position to that of an innocent donee of trust property suggests the propriety of treating A as an innocent constructive trustee.<sup>13</sup>

A strict adherence to the doctrine of relation back would involve the court in the absurdity of holding that legal ownership in severalty is vested in two persons at the same time. But if B's interest, prior to the revocation of the first probate, be called an equitable one, and if A be treated as an innocent donee of trust property, his liability to account for the dividends will depend upon whether or not that income is still in his possession, either in its original form or in the shape of a traceable product.<sup>14</sup> If it is in his possession, there is no injustice in taking from him something which he has received as a mere windfall; but if the money has been spent, and he has nothing to show for it, he should not be held to account.

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DISREGARDING THE SEPARATE PERSONALITY OF A CORPORATION.—  
The conception of a corporation as a personality wholly separate and dis-

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<sup>2</sup> *Poag v. Carroll*, Dud. Law (S. C.) 1.

<sup>3</sup> *Anon.*, 1 P. Wms. 495.

<sup>4</sup> *Orr v. Kaines*, 2 Ves. 194; *Wallace v. Latham*, 52 Miss. 291.

<sup>5</sup> *Cf. Le Baron v. Fauntleroy*, 2 Fla. 276, 301.

<sup>6</sup> *Gittins v. Steele*, 1 Swanst. 199; *Jervis v. Wolferstan*, L. R. 18 Eq. 18, 27.

<sup>7</sup> See *Buerhaus v. De Saussure*, 41 S. C. 457.

<sup>8</sup> *Deeks v. Strutt*, 5 T. R. 690.

<sup>9</sup> *Doe d. Saye v. Guy*, 3 East 120; *Williams v. Lee*, 3 Atk. 223.

<sup>10</sup> *Cf. Allen v. Dundas*, 3 T. R. 125.

<sup>11</sup> *Thompson v. Samson*, 64 Cal. 330. *Cf. Fisher v. Bassett*, 9 Leigh (Va.) 119.

<sup>12</sup> *Steele v. Renn*, 50 Tex. 467. *Cf. Packman's Case*, 6 Coke 18 b.

<sup>13</sup> *Otis v. Otis*, 167 Mass. 245.

<sup>14</sup> See 19 HARV. L. REV. 515 *et seq.*



tinct from the individuals who compose it, whether it be considered a legal fiction or a reality,<sup>1</sup> has, nevertheless, been a ruling principle in the development of the common law of corporations, and is the characteristic which most distinguishes a corporation from unincorporated associations.<sup>2</sup> It is this personality which is liable on contracts made in the corporate name,<sup>3</sup> which must be the grantor of corporate property even though the shares of stock are owned entirely by one man,<sup>4</sup> and against which, as party to a suit, there cannot be introduced in evidence the admission of a shareholder.<sup>5</sup> In the recent case of *In re Watertown Paper Co.*, 22 Am. B. R. 190, it was held that the claim of one corporation against another is provable in bankruptcy even though the shares in both corporations are owned entirely by the same individuals.

It is the opinion of some writers that, with the development of modern business corporations and the many statutory limitations on the corporate device, the conception of a separate personality has outlived its usefulness and a clear view may be had only by dismissing it.<sup>6</sup> Certainly the conception is not applicable where the powers granted to the individuals do not in reality constitute them a corporation. But if it is meant that the separate corporate personality should be disregarded in every case, it is no more than saying that the corporation itself should be eliminated. However, the formation of corporations has become such a simple matter under the general incorporation laws of modern times, that there are many possibilities for working fraud and injustice in the use of the corporate device where, if the conception of a separate corporate personality be retained throughout, it will be impossible to grant relief.<sup>7</sup> For example, certain individuals, having sold their business and good will to another and having contracted not to engage further therein, might form a corporation to enter into the same business. If the separate personality of a corporation could never be disregarded, the court would see only that separate personality, the corporation. As this has no connection with the contract of the individuals who compose it, relief, under the circumstances supposed, would be impossible.<sup>8</sup>

Certainly such a result would be undesirable. And it is believed that, while leaving the conception of the separate corporate personality entirely unaltered at law,<sup>9</sup> justice can be obtained by the interposition of equity on settled principles of equity jurisdiction. Equity has long had jurisdiction in many instances to restrain the unconscionable exercise of a legal right, when the plaintiff would have no standing in a court of law. So a tenant without impeachment of waste may be restrained from equitable waste;<sup>10</sup>

<sup>1</sup> Carr, Corporations, 150-185.

<sup>2</sup> *Warner v. Beers*, 23 Wend. (N. Y.) 103, 155; 1 Clark & Marshall, Private Corporations, § 17.

<sup>3</sup> See *People v. American Bell Telephone Co.*, 117 N. Y. 241, 255.

<sup>4</sup> *Parker v. Bethel Hotel Co.*, 96 Tenn. 252.

<sup>5</sup> *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173.

<sup>6</sup> *Taylor, Corporations*, 5 ed., Preface, ix; 19 Am. L. Rev. 114, where a like view is attributed to Pomeroy.

<sup>7</sup> 2 Cook, Corporations, 6 ed., § 663.

<sup>8</sup> Under similar circumstances relief was given in *Beal v. Chase*, 31 Mich. 490, and *Booth v. Seibold*, 37 N. Y. Misc. 101.

<sup>9</sup> *Morawetz, Corporations*, § 227.

<sup>10</sup> *Duncombe v. Felt*, 81 Mich. 332; *Kane v. Vanderburgh*, 1 Johns. Ch. (N. Y.) 11.

and, on a stipulation for a forfeiture, the defaulting party is frequently relieved in any manner made necessary by the circumstances of the case.<sup>11</sup> The right of using the corporate device when exercised to defeat justice may well be controlled by equity in the same way. And although at present the actual decisions do not seem to be governed by any settled theory of granting relief, as yet, except in a very few cases, the corporate personality has been disregarded only when there have been present the elements necessary to the equitable relief suggested.

**LIBEL WITHOUT INTENT.** — By affirming malice to be the gist of an action for defamation the books have given the impression that this action differs from other tort actions.<sup>1</sup> In fact, however, proof of malice has never been necessary, because, as is said, the law will conclusively presume malice from a publication without excuse or justification.<sup>2</sup> But it has always been clear that, given a libelous publication, the publisher cannot escape liability on the ground that the publication was inadvertent or accidental,<sup>3</sup> or that he did not believe the matter to be libelous;<sup>4</sup> so that a discrepancy exists between the actual requirements of the old courts and what they professed to require. On the other hand, it has been laid down that malice is not necessary; that it is not a question of the defendant's wickedness, but of the injury done to the reputation of the plaintiff in the opinion of other men;<sup>5</sup> and that to determine such injury the courts will regard the tendency of the publication rather than the intention of the publisher.<sup>6</sup> Thus if the plaintiff's friends and neighbors believe that he was referred to,<sup>7</sup> or if that is the reasonable impression conveyed by the publication,<sup>8</sup> the defendant is liable.

The tendency of modern courts in this country is to make no distinction, as regards malice or intention, between tort actions in general and actions for defamation.<sup>9</sup> High authority in England has expressed the view that there is civil responsibility for the consequences of a libelous publication where the defendant should have known that what he published was likely to injure the plaintiff.<sup>10</sup> Further it is said that neither the intention with which a tortfeasor acted, nor the state of his feelings toward the person injured or the public, can make him less responsible for the injury actually caused by his wrongful act.<sup>11</sup> Carelessly to utter defamatory statements entails the same responsibility for the injurious conse-

<sup>11</sup> *Tibbetts v. Cate*, 66 N. H. 550; 1 Pomeroy, Equity, 3 ed., § 450.

<sup>1</sup> Odgers, Libel and Slander, \* 5 and note.

<sup>2</sup> *Bromage v. Prosser*, 4 B. & C. 247.

<sup>3</sup> Odgers, Libel and Slander, \* 264; *Shepherd v. Whitaker*, L. R. 10 C. P. 502.

<sup>4</sup> *Curtis v. Mussey*, 72 Mass. 261.

<sup>5</sup> *Sheffill v. Van Deusen*, 13 Gray 304.

<sup>6</sup> Odgers, Libel and Slander, \* 264.

<sup>7</sup> *Bourke v. Warren*, 2 C. & P. 307.

<sup>8</sup> *The King v. Clerk*, 1 Barnardiston 304.

<sup>9</sup> *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 302 and 304, *per Holmes, J.*; *Farley v. Evening Chronicle Pub. Co.*, 113 Mo. App. 216, 227, and cases cited.

<sup>10</sup> *Capital and Counties Bank v. Henty*, 7 App. Cases 741, 742, *per Blackburn, J.*; *Bower, Defamation*, p. 55, note; *Clerk and Lindsell, Torts*, 2 ed., 474.

<sup>11</sup> *Farley v. Evening Chronicle Pub. Co.*, *supra*.



quences as negligently to cast about firebrands,<sup>12</sup> or shoot off a gun:<sup>13</sup> since the defendant has in fact done the wrongful act he must be taken to have intended the consequences which naturally resulted.<sup>14</sup>

A recent English decision is in accord with this view of the law, holding that a defendant is liable for a libelous publication intended to refer to a fictitious person but reasonably believed by third persons to refer to the plaintiff. *Jones v. Hutton & Co.*, L. R. [1909] 2 K. B. 444. The dissenting opinion, by requiring an intent to publish of and concerning the plaintiff, harks back to the old idea that malice is the gist of the action. But this view has been materially weakened by more recent decisions,<sup>15</sup> whose trend, like that of the main case, is to do away with needless presumptions. It is worthy of note that the main case has called from the learned editor of the LAW QUARTERLY REVIEW the criticism that an action of defamation is not an action of trespass for interference with the plaintiff's reputation considered as property to be meddled with at peril, but an action on the case for a wilful wrong.<sup>16</sup> Nevertheless the same eminent authority has elsewhere stated the common-law doctrine to be, in effect, that "a man acts at his peril in making defamatory statements."<sup>17</sup> It is submitted that this latter is a correct statement of the law, and that intent is not essential to libel.

RIGHTS OF A SECURED CREDITOR OF A BANKRUPT. — A secured creditor of a bankrupt may adopt one of three courses: (1) he may surrender the security and prove in the bankruptcy court for the whole debt;<sup>1</sup> (2) he may rely on his security and not prove;<sup>2</sup> or (3) he may realize on his security and prove for the balance.<sup>3</sup> Some courts allow him to prove for the whole debt and then to realize on the security.<sup>4</sup> This so-called "chancery rule" is adopted by the Federal courts in dealing with insolvent national banks,<sup>4</sup> and by the weight of authority applies in assignments for the benefit of creditors.<sup>5</sup> But it is inapplicable in bankruptcy proceedings under the National Bankruptcy Act.<sup>6</sup>

Interesting questions arise as to the right of a secured creditor to marshal the security against interest accruing after the date of the bankruptcy, up to the date of the liquidation of the security. If the creditor elects to rely on his security and not prove, he may be allowed to realize on this

<sup>12</sup> *Capital and Counties Bank v. Henty*, *supra*.

<sup>13</sup> *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 301; *Odgers, Libel and Slander*, \*264.

<sup>14</sup> *Hill v. Winsor*, 118 Mass. 251.

<sup>15</sup> *Ellis v. Brockton Pub. Co.*, 198 Mass. 538.

<sup>16</sup> 100 *Law Quarterly Rev.* 341.

<sup>17</sup> *Pollock, Torts*, 7 ed., 600.

<sup>1</sup> See *Cracknall v. Janson*, 6 Ch. D. 735. Proof of the whole debt as an unsecured debt operates as a waiver of the security. *White v. Crawford*, 9 Fed. 371; *In re Bear*, 5 Fed. 53.

<sup>2</sup> *Yeatman v. Saving Inst.*, 95 U. S. 764.

<sup>3</sup> 30 U. S. Stat. at L. 563, sec. 63; *White v. Simmons*, L. R. 6 Ch. App. 555.

<sup>4</sup> *Merrill v. Nat'l Bank*, 173 U. S. 131.

<sup>5</sup> *National Bank v. Haug*, 82 Mich. 607; see 21 HARV. L. REV. 280. There is, however, a strong minority view. *Merchants' Nat'l Bank v. Eastern Railroad*, 124 Mass. 518; *Nat'l Union Bank v. Nat'l Mechanics' Bank*, 80 Md. 371.

<sup>6</sup> 30 U. S. Stat. at L. 563, sec. 63.

claim for interest; for the right to do so is clearly implied in a contract for security, and there is no equitable reason to deprive him of it.<sup>7</sup> But if he elects to realize on the security and prove for a balance, a more difficult problem is presented. English authority is well settled that, if the security is insufficient to satisfy the whole claim, and if the creditor is seeking a dividend for the balance, he will not be allowed to satisfy the claim for after-accrued interest.<sup>8</sup> A Federal court recently reached an opposite conclusion, strongly criticizing the English rule. *In re Kessler & Co.*, 171 Fed. 751. The effect of this decision seems to be to allow the secured creditor to prove for an unprovable part of his claim. And in the analogous case where a foreign creditor, who has achieved partial satisfaction out of property in a foreign jurisdiction, seeks to prove for the balance, the bankruptcy court refuses to allow him to do so until he has paid into court the value of the property thus obtained.<sup>9</sup> The foreign creditor has not received a preference<sup>10</sup> for which the court can make him account, yet it adopts the position that it is unfair to the other creditors that he should share in the common fund unless he gives up the advantage which chance has put in his way. Similarly, although a secured creditor may keep his security and satisfy all of his claim, yet if he comes into a bankruptcy court, he ought to be put on an equal footing with the other creditors in respect that interest is allowable only to the date of the petition. The principle in its application resembles the doctrine that he who asks equity must do equity.

Both the "chancery rule"<sup>11</sup> and the principal case seem contrary to the intent of the bankruptcy statutes, which is, to effect such an approximation to equality among the creditors as is fair to all concerned. Although equity will not allow the marshalling of assets to the prejudice of the paramount creditor,<sup>12</sup> yet it is submitted that insolvency should never operate to deny the creditor the benefit of the application of that doctrine. It is a question of judgment whether equity should look solely to the interests of the secured creditor, or should also consider the interests of the general creditors. As the secured creditor is amply rewarded for his diligence when he is allowed to realize on his security first, the wisdom of the National Bankruptcy Act<sup>13</sup> in so restricting him seems unquestionable.

<sup>7</sup> *Coder v. Arts*, 152 Fed. 943, 949.

<sup>8</sup> *Ex parte Wardell* and *Ex parte Hercey*, 1 Cooke, Bankruptcy Law, 206; *In re Savin*, 7 Ch. 760; *In re London, Windsor, etc., Co.*, [1892] 1 Ch. 639.

<sup>9</sup> *In re Bugbee*, 9 N. B. R. 258; *Ex parte Wilson*, L. R. 7 Ch. 490. See *Selkrig v. Davies*, 2 Dow 230.

<sup>10</sup> A creditor who has received a preference will not be allowed to prove until he has deposited the property received or its value in court. *In re Otto F. Lange Co.*, 22 Am. B. R. 414.

<sup>11</sup> See dissenting opinion of Gray, J., in *Merrill v. Nat'l Bank*, *supra*.

<sup>12</sup> See *Boone v. Clarke*, 129 Ill. 466, 5 L. R. A. 276.

<sup>13</sup> 30 U. S. Stat. at L. 563, sec. 63.



## RECENT CASES.

**BANKRUPTCY — PROVABLE CLAIMS — RIGHTS OF SECURED CREDITOR.** — After the filing of the petition in bankruptcy a creditor of the bankrupt liquidated his security, which was not sufficient to satisfy his whole claim. *Held*, that he cannot satisfy the claim for interest accruing between the date of the petition and the date of the liquidation of the security, and prove for the balance. *In re Kessler & Co.*, 171 Fed. 751 (Dist. Ct., S. D. N. Y.). See NOTES, p. 219.

**BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — EXAMINATION BEFORE ADJUDICATION.** — After an involuntary petition in bankruptcy had been filed against the plaintiff, but before he was adjudicated bankrupt, a special reference was granted to the receiver, empowering him to examine the plaintiff. *Held*, that this examination is unauthorized. *Skubinsky v. Bodex*, 172 Fed. 332 (C. C. A., Third Circ.).

Section 21 a of the Bankruptcy Act of 1898 gives the court power to require the appearance before a referee of a bankrupt whose estate is "in process of administration." And the text writers agree that the acts of a receiver before adjudication are acts of administration. See COLLIER, BANKRUPTCY, 7 ed., 734. Moreover, the desirability of a prompt investigation into the affairs of a bankrupt is undoubted. Furthermore, the filing of a petition in bankruptcy gives to the court broad powers. BANKRUPTCY ACT OF 1898, §§ 2 (3), (15); 9 b. Yet the narrow interpretation of section 21 a given in the principal case, is supported by the latest decisions. *In re Davidson*, 158 Fed. 678; *In re Crenshaw*, 155 Fed. 271. But under a somewhat similar provision of the Act of 1867 an examination before adjudication was allowed. *In re Salkey*, Fed. Cas. No. 12,252. And since the law aims to have all of the bankrupt's property ascertained for the protection of creditors, the decision in the principal case seems wrong. *In re Fleischer*, 151 Fed. 81; *In re Herskovitz*, 152 Fed. 316.

**BILLS AND NOTES — CHECKS — WHETHER RECEIPT OF CHECK DISCHARGES ORIGINAL OBLIGATION.** — For several years the interest on the defendant company's debentures held by the plaintiff was paid by checks which were not cashed. On the failure of the defendant, the plaintiff claimed priority over the simple contract creditors as to the amount of the interest. *Held*, that the mere receipt of the checks does not prevent the plaintiff from ranking as a secured creditor. *In re Defries & Sons, Ltd.*, [1909] 2 Ch. 423.

In the absence of any express agreement to the contrary, the mere receipt of a check will not operate as a discharge of the original debt. *Taylor v. Wilson*, 11 Met. (Mass.) 44. An actual payment of the check is necessary. *Sage v. Burton*, 84 Hun (N. Y.) 267. This is especially true when there is a higher legal remedy on the original cause of action than on the check. *Davis v. Gyde*, 2 A. & E. 623. In the principal case, it would be unjust for the plaintiff to be forced to give up the security on the debentures, simply because the defendants mailed her a check. But the acceptance of a check implies an undertaking to present it for payment in a reasonable time, and if the failure to do so has caused the defendant any damage, the amount of the plaintiff's recovery should be reduced to that extent. *Brown v. Schintz*, 202 Ill. 509. If the defendant suffers no damage by reason of the plaintiff's laches, there is no set-off, and the burden of proving damage is on the defendant. *Bradford v. Fox*, 38 N. Y. 289.

**CARRIERS — DUTY TO TRANSPORT AND DELIVER — DISCRIMINATION WITHIN A CLASS OF GOODS.** — The defendant express company was accustomed to carry merchandise C. O. D., but refused to carry in that way liquor offered for ship-

ment by the plaintiff. *Held*, that the plaintiff is not entitled to a mandatory decree compelling the carriage of liquor C. O. D. *Burke v. Platt*, 172 Fed. 777 [Circ. Ct., N. D. W. Va.] See NOTES, p. 212.

CONFLICT OF LAWS — EXECUTION OF POWER — LAW GOVERNING VALIDITY OF EXECUTION BY WILL. — The donee under an English will of a power of appointment over personalty, to be exercised by deed or will, was domiciled in Germany at the time of her death. Her will, purporting to exercise the power, was duly attested according to the law of England, but was invalid according to German law. *Held*, that the document is admissible to probate in England for the purpose of the appointment. *Murphy v. Deichler*, [1909] A. C. 446.

In general, unless a will of movables is executed according to the law of the testator's domicile, it is nowhere valid. *Craigie v. Lewin*, 3 Curt. Eccl. 435; *Goods of Gutierrez*, 20 L. T. N. S. 758. But the exercise of a power of appointment, unlike the disposition of property actually owned by the testator, is not a testamentary act. See *Pouey v. Hordern*, [1900] 1 Ch. 492. It is the completion of a gift which has its effect from the instrument creating the power. Therefore the intent of the creator of the power should determine the validity of a will purporting to exercise it. If he expresses certain requirements as to attestation, a will not complying is not a valid exercise of the power, although it is admissible to probate. *In re Kirwan's Trusts*, 25 Ch. 373; *Barretto v. Young*, [1900] 2 Ch. 339. Where the instrument creating the power simply provides that it is to be exercised by "will," it seems a natural construction to say that the intent of the testator will be satisfied either by a physical document purporting to be a will or by a legally operative testamentary disposition. Therefore a will executed according to the law of the donor's domicile satisfies the creator's intention under the former theory, or a will executed according to the law of the donee's domicile satisfies it under the latter. *D'Huart v. Harkness*, 34 Beav. 324; *In re Alexander*, 29 L. J. P. & M. 93. See 19 HARV. L. REV. 122. Thus the apparent anomaly of the principal case may be explained.

CONTEMPT — POWER TO PUNISH FOR CONTEMPT — IMPRISONMENT OF WARD OF COURT FOR DISOBEDIENCE. — An infant became married without the consent of a court of chancery of which he was a ward. *Held*, that he be imprisoned for contempt of court. *In re H's Settlement*, [1909] 2 Ch. 260.

The filing of a bill against an infant, or the payment into court of funds settled upon him, will constitute the infant a ward of the court. *In re Hodge's Settlement*, 3 K. & G. 213. And any interference with a ward's person or property, such as marrying him without the court's license, is a criminal contempt of court. *Butler v. Freeman*, 1 Ambl. 301; *Wellesley's Case*, 2 Russ. & M. 639. The court's direct control of a ward is usually exercised through an appointed guardian, whose commands the infant is under a duty to obey. *Tremain's Case*, 1 Str. 167. A ward's disobedience to the orders of a court, whether issued through the medium of a guardian or not, would be only a civil contempt of court. See 21 HARV. L. REV. 161. The case then is difficult to support. The imprisonment cannot be a punishment, for no crime has been committed; and the court is not attempting to enforce any order by imprisonment. It could be said that the jailer is made a guardian of the infant, but no contempt of court is necessary to authorize a change of guardians. In the United States, chancery has never interfered with the marriage of its wards. See *Chambers v. Perry*, 17 Ala. 726.

CORPORATIONS — NATURE OF CORPORATION — SEPARATE CORPORATE PERSONALITY. — Corporation A and corporation B were owned entirely by the same individuals. Corporation A became bankrupt and corporation B attempted to prove a claim against it. *Held*, that the claim is provable. *In re Watertown Paper Co.*, 22 Am. B. R. 190 (C. C. A., Second Circ.). See NOTES, p. 216.



**CORPORATIONS — STOCKHOLDERS — DIVIDENDS ON PREFERRED STOCK.** — The preferred stock of the defendant corporation was entitled to a preferential yearly dividend of five per cent. For eight years the stipulated dividend was paid, while dividends on common stock were, except for two years, always less than five per cent. An eight per cent dividend was then declared on both preferred and common stock. The plaintiff, a common stockholder, sought to restrain the payment of more than five per cent on the preferred stock. *Held*, that in the absence of an express contract to that effect, dividends on preferred stock are not limited to the amount of the preference. *Sternbergh v. Brock*, 74 Atl. 166 (Pa.).

The peculiar rights of preferred stockholders are wholly a matter of contract, determined by the terms of the stock certificates and the by-laws and acts of the corporation regulating the issue. *Smith v. Cork & Bandon Ry. Co.*, Ir. R. 3 Eq. 356, 374; *Belfast & Moosehead Lake R. Co. v. Belfast*, 77 Me. 445. When the language is not explicit, the question becomes one of construction. On principle, there seems to be no reason why priority of right should mean restriction of interest. *Fidelity Trust Co. v. Lehigh Valley R. Co.*, 215 Pa. St. 610. *Contra*, *Scott v. Baltimore & Ohio R. Co.*, 93 Md. 475. The interest which holders of preferred stock have in the business is not that of creditors, entitling them to a certain rate of interest. *Chaffee v. Rulland R. Co.*, 55 Vt. 110. In construing these contracts, however, the courts should give great weight to the practical interpretation of the parties themselves. See *Topliff v. Topliff*, 122 U. S. 121. Whether or not the common stockholders in the principal case received more than a five per cent dividend during the two years mentioned in the statement of facts, does not appear. If they did, the acquiescence of the preferred stockholders should have been sufficient evidence of their understanding of the contract, to have justified the court in adopting the construction contended for by the plaintiff. *Cf. Kidwell v. Baltimore & Ohio R. Co.*, 11 Grat. (Va.) 676.

**CRIMINAL LAW — STATUTORY OFFENSES — ILLEGAL SALE OF LIQUOR BY PARTNER.** — A druggist was indicted under a statute making it unlawful "for any person, personally or by agent," to sell liquor under certain circumstances. The sale was made by the defendant's partner, in his absence and without his knowledge or consent. *Held*, that the defendant can be convicted. *State of Ohio v. Turner*, 54 Oh. L. Bull. 409. (Oh., Ashtabula Prob. Ct., July, 1909.)

The theory governing criminal responsibility for the acts of an agent or partner is entirely different from that of vicarious civil liability. See *George v. Gobey*, 128 Mass. 289; *People v. Parks*, 49 Mich. 333. At common law, a man can be held for another's crime only when he has, in some sense, caused it. Thus, a principal, to be punished for his agent's criminal act, must have directed or assented to it. *United States v. Ash*, 75 Fed. 651. For violations of liquor laws, implied authorization is sufficient ground for conviction. *State v. Bierman*, 1 Strobb. (S. C.) 256; *Moore v. State*, 64 Neb. 557. But authorization of some kind is an indispensable requisite for holding a merchant who was not present at the illegal sale. *Commonwealth v. Wachendorf*, 141 Mass. 270; *Beane v. State*, 72 Ark. 368. *Contra*, *State v. Gilmore*, 80 Vt. 514. A statute unequivocally imposing an absolute duty abolishes this requisite. *Mullnix v. People*, 76 Ill. 211. Where the legislature has not imposed this duty in unmistakable terms, the courts have reached diverse and irreconcilable results; and the decisions under statutes very similar to the one set out above have not been uniform. See *Barnes v. State*, 19 Conn. 398; *People v. Longwell*, 120 Mich. 311. While in the principal case the court did not rigidly adhere to the rule that a criminal statute is not to be construed to hold a person unless he is unequivocally included within its terms, the interpretation is reasonable and is likely to be followed, as the courts seem to be influenced by the prevailing movement against liquor.

**DAMAGES — CONSEQUENTIAL DAMAGES — WHAT IS SUFFICIENT NOTICE OF SPECIAL FACTS.** — Owing to the defendant's delay in transporting a machine,

the plaintiff's sawmill was forced to remain idle. The only notice of this consequence was such as might be inferred from the character of the machine itself. *Held*, that the defendant is liable for the consequent loss of profits. *Story Lumber Co. v. So. Ry. Co.*, 65 S. E. 460 (N. C.).

A defendant is liable not only for the natural or usual consequences of a breach of contract, but also for such special damages as the parties ought reasonably to have contemplated. *Hadley v. Baxendale*, 9 Exch. 341; *Devlin v. The Mayor*, 63 N. Y. 8. In other words "natural consequences" for which one is liable are those which the parties with their actual knowledge ought reasonably to have apprehended. See SEDGWICK, DAMAGES, 8 ed., § 153. It is never necessary for the parties actually to foresee the consequences. See 19 HARV. L. REV. 531. Hence a defendant need be informed only of such special facts as would constitute notice to a reasonable man. Such notice may be given by an explicit statement or by some act or circumstance from which the average man would infer the existence of the special facts. *Simpson v. London & N. W. Ry.*, 1 Q. B. D. 274. The character of the goods alone may be enough. Thus by their very nature, theatrical properties may afford notice to a carrier that delay in transportation will prevent a theatrical performance. *Weston v. Ry.*, 190 Mass. 298. But as a question of fact, it is doubtful whether a carrier of machinery ought to infer that it is intended for immediate use, for as often as not, machinery is ordered to anticipate future needs. See *Thomas, etc., Mfg. Co. v. Ry.*, 62 Wis. 642.

DAMAGES — MEASURE OF DAMAGES — INJURY FROM FRIGHT ACCOMPANIED BY CONTACT. — A few drops of melted lead were negligently cast on the plaintiff by a slight explosion. The fright produced so affected her that she suffered three miscarriages within the next few months. *Held*, that she cannot recover for the fright or its consequences. *Hack v. Dady*, 118 N. Y. Supp. 906 (Sup. Ct., App. Div.).

For bodily injury caused by fright unaccompanied by physical contact, a claim for damages is not usually allowed. *Spade v. Lynn & Boston R. R. Co.*, 168 Mass. 285. Although such a claim is logically unimpeachable, the rule against recovery is laid down because of the supposed impracticability of otherwise overthrowing numerous trumped-up suits. *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107. Where the reality of the cause is proved by visible injury from actual contact, it is unfair to press this arbitrary rule at the expense of meritorious claimants. The doctrine of the principal case would exclude fright or its consequences as a basis for damages in any ordinary action for negligence, and is against the decided weight of authority. *Lofink v. Interborough Rapid Transit Co.*, 102 N. Y. App. Div. 275; *Homans v. Boston Elevated Ry. Co.*, 180 Mass. 456.

DOMICILE — INTENTION REQUISITE TO EFFECT CHANGE — FOREIGNER IN CHINESE TREATY PORT. — One born in Maine went to Shanghai as a youth and remained until his death about forty years later. *Held*, that his will should be admitted to probate in the United States consular court in Shanghai. *Mather v. Cunningham*, 3 Am. Journ. Int. L. 752 (Me., Sup. Ct., Apr. 15, 1909). See NOTES, p. 211.

EQUITY — JURISDICTION — PREVENTION OF MULTIPLICITY OF ACTIONS. — The plaintiff brought a bill in equity joining A and B as defendants. The bill alleged that the plaintiff owned a lot fifty feet wide, that A owned a lot on one side and B owned a lot on the other side of the plaintiff's lot, that all three claimed under a common grantor, that A and B had erected buildings on their lots, that these buildings were less than fifty feet apart, but that the plaintiff's surveyors could not agree as to which defendant was encroaching. The bill prayed for a determination of the encroachment and a decree for the removal of the encroaching building and damages. *Held*, that the bill is not demurrable. *Caleo v. Goldstein*, 118 N. Y. Supp. 859 (Sup. Ct., App. Div.).



Equity pleading commonly allows several defendants to be joined in a single bill for the purpose of quieting the plaintiff's title or preventing a multiplicity of suits upon the same question. *Bryan v. Bryan*, 61 N. J. Eq. 45; *Board of Supervisors v. Deyoe*, 77 N. Y. 219. There must ordinarily be a community of interest among the several defendants in every question of law and of fact involved in the controversy. Cf. *Wyman v. Bowman*, 127 Fed. 257, 262. The jurisdiction is somewhat elastic, however, depending upon the exigencies of the plaintiff's situation. See *Hale v. Allinson*, 188 U. S. 56, 77. Thus where the need is urgent, a large number of separate claims arising out of the same general transaction, but differing in respect to good faith, may be determined in a single suit. *New York & New Haven R. R. v. Shuyler*, 17 N. Y. 592. But the present case presents no common question of law or of fact in respect to the two defendants. It does not state a sufficient cause of action against either, since consistently with the allegations of the bill the common grantor may have been the only wrongdoer. And clearly the purpose of preventing a multiplicity of suits cannot create a cause of action where none exists separately. *Roland Park Co. v. Hull*, 92 Md. 301.

FEDERAL COURTS — JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP — POWER OF REMOVAL WHEN ALIEN SUES CITIZEN OF ANOTHER STATE. — An Act of Congress gives the circuit courts concurrent jurisdiction with the state courts over suits involving more than \$2,000 between citizens of a state and aliens, with a provision that the suit must be brought in the district where the defendant resides. ACT OF AUG. 13, 1888; U. S. COMP. ST. (1901), 508. An alien brought an action against an Illinois corporation in an Iowa state court. The defendant had the suit removed to the Circuit Court for the Northern District of Iowa, and the plaintiff moved to have it remanded. *Held*, that the motion to remand should be denied. *Barlow v. Chicago & N. W. Ry. Co.*, 172 Fed. 513 (Circ. Ct., N. D. Ia.).

A recent decision in another district reached the opposite result. *Mahopoulos v. Chicago, R. I. & P. Ry. Co.*, 167 Fed. 165. But an earlier decision decided the point in accord with the principal case without discussion. *Uhle v. Burnham*, 42 Fed. 1. It is well settled that no suit can be removed over which the federal court would not have original jurisdiction. *Cochran v. Montgomery Co.*, 199 U. S. 260. The provision that the suit must be brought in the district where the defendant resides, applies to actions brought by aliens against citizens of a state. *Galveston, etc. Railway v. Gonzales*, 151 U. S. 496. But it has been held manifestly inapplicable to actions brought by citizens of a state against aliens. *Case of Hohorst*, 150 U. S. 653. This provision, however, has been interpreted as not affecting the general jurisdiction of the courts, but as being in the nature of an exemption in favor of the defendant which he may waive. *Ex parte Schollenberger*, 96 U. S. 369, 378; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 229. See 21 HARV. L. REV. 630. In view of the authorities, therefore, the principal case can be supported, as the federal court might have taken original jurisdiction of the suit with the consent of the defendant. It is submitted, however, that this construction of the statute is somewhat bold, since the jurisdiction of the circuit courts is confined to cases where it has been expressly conferred by Congress. *United States v. Hudson*, 7 Cranch (U. S.) 32.

FEDERAL COURTS — RELATIONS OF STATE AND FEDERAL COURTS — EQUITY JURISDICTION OVER WILLS. — The plaintiff brought a bill in equity in the federal court, asking (1) that a certain legacy be declared lapsed and be paid to the plaintiff, and (2) that the defendant executor render an account of the entire estate. The requirement as to diversity of citizenship was satisfied. *Held*, that the court has jurisdiction as to the first prayer but not as to the second. *Waterman v. Canal-Louisiana Bank*, U. S. Sup. Ct., Nov. 8, 1909.

Over matters relating strictly to the probate of a will the federal courts in

general have no jurisdiction, for it concerns a matter analogous to proceedings *in rem* and is best left to the probate courts of the state concerned. *Broderick's Will*, 21 Wall. (U. S.) 503. Furthermore, where a state court has assumed control of an estate, the federal court will not interfere with its administration and distribution. *Byers v. McAuley*, 149 U. S. 608, 614. Such an extensive prayer as for an accounting was, therefore, properly denied. *Moore v. Fidelity Trust Co.*, 138 Fed. 1. But the federal courts may determine the conflicting rights of individuals under a will, where diversity of citizenship appears. *Byers v. McAuley*, *supra*, 620. For this need not interfere with the administration by the state court. *Ingersoll v. Coram*, 211 U. S. 335, 358. Nor can state statutes interfere with or limit this right. *Payne v. Hook*, 7 Wall. (U. S.) 425. Furthermore, if a state allows its own citizens to attack the validity of probate proceedings, the federal courts will furnish the same remedies to citizens of other states or aliens. *Farrell v. O'Brien*, 199 U. S. 89, 110. Accordingly, the federal courts have undoubted power to interpret a probated will. *Wood v. Paine*, 66 Fed. 807. They may also decide who is entitled to a certain devise. See *Byers v. McAuley*, *supra*, 620. And to declare that the plaintiff in the principal case was entitled to a lapsed legacy seems clearly within their jurisdiction.

INFANTS — CONTRACTS — RECOVERY FOR SERVICES. — A, an infant, agreed to work for B until he became of age, B agreeing to support A as a member of his family. Before A reached his majority, the parties agreed to sever the *quasi* family relationship, B paying A \$100 for his services, and A leaving B's home. A later repudiated the settlement and brought an action on a *quantum meruit* for the value of his services. *Held*, that he cannot recover. *Robinson v. Van Vleet*, 121 S. W. 288 (Ark.).

Contracts made by infants for their services are usually held to be voidable at the infant's option. *Dubé v. Beaudry*, 150 Mass. 448. And the minor can then recover the value of his services on an implied contract. *Vehue v. Pinkham*, 60 Me. 142. Moreover, the infant's right to rescind his contract does not depend on whether the other party can be restored to his original position. *Drude v. Curtis*, 183 Mass. 317. See 17 HARV. L. REV. 60. Some decisions, however, have held it to be against public policy to allow a minor to recover the value of his services from one who has taken him into his household. *Spicer v. Earl*, 41 Mich. 191; *Stone v. Dennison*, 30 Mass. 1. And the same result has been reached by holding such contracts binding because they are for necessities. *Wilhelm v. Hardman*, 13 Md. 140. It would seem better to treat all contracts of an infant for his services as voidable, according to the general rule, allowing the employer to set off, in an action by the infant on a *quantum meruit*, the reasonable value of necessities supplied by him. *Meredith v. Crawford*, 34 Ind. 399.

INJUNCTIONS — ACTS RESTRAINED — COLLECTION OF TAX NOT DUE. — Through a mistake of law, the plaintiff included goods of another in a sworn property list furnished to the assessor. *Held*, that the plaintiff cannot enjoin the collection of any part of the tax. *Peacock Mill Co. v. Honeycutt*, 103 Pac. 1112 (Wash.).

Courts of equity properly hesitate to interfere with so vital a function of sovereignty as the collection of revenue. Their hands are not unfrequently tied by statutes. See U. S. COMP. STAT. (1901), § 3224; 45 CENT. DIG., § 1228 *et seq.* In the absence of statutes, most courts refuse an injunction, if the only fact shown is that the tax is illegal or void. *Kelley v. Barton*, 174 Mass. 396. But the collection will be enjoined, if it further appears that there is no adequate remedy at law to recover the taxes paid. *Bank of Kentucky v. Stone*, 88 Fed. 383. A few statutes provide for the recovery of taxes paid under mistake of law. *Catholic Society v. City of New Orleans*, 10 La. Ann. 73. See *George's Creek, etc., Co. v. County Comm'rs of Alleghany County*, 59 Md. 255. Apart from statutes, however, the overwhelming weight of American authority denies recovery at law.



*Phelps v. Mayor, etc., of City of New York*, 112 N. Y. 216. *Contra, City of Newport v. Ringo's Ex'x*, 87 Ky. 635. See 11 HARV. L. REV. 475; 21 *ibid.* 225. So under the strict view, the principal case seems a proper subject for equitable relief. Furthermore, a substantial minority of American cases have adopted a looser view, allowing an injunction against the collection of any illegal tax. *Albany Bottling Co. v. Watson*, 103 Ga. 503, 508. The reason, perhaps, is that the taxation officials are exercising a position of trust. See COOLEY, TAXATION, 3 ed., 1419. Former cases in the jurisdiction of the principal case incline toward this minority view. See *Lewiston Water & Power Co. v. County of Asotin*, 24 Wash. 371. Moreover, by the better view the plaintiff is not estopped to attack the validity of the assessment. *City of Charlestown v. County Comm'rs of Middlesex*, 109 Mass. 270. *Contra, Inland Lumber & Timber Co. v. Thompson*, 11 Idaho 508, 515. The principal case seems hard to defend upon any theory.

INSURANCE — CONSTRUCTION AND OPERATION OF CONDITIONS — PRO RATA CLAUSE: OPERATION IN POLICIES NOT COEXTENSIVE. — A policy of insurance on cotton in a warehouse stipulated that the defendant should not be liable for a greater proportion of the loss than the amount for which the defendant insured the said cotton bore to the whole insurance thereon. A second policy covered cotton both inside and outside the warehouse. A fire destroyed all the cotton inside and part of the cotton outside the warehouse. *Held*, that the plaintiff can recover on the first policy only that proportion of the loss which the face value of the first policy bears to the total face value of both policies after subtracting the value of the cotton which was destroyed outside the warehouse. *Liverpool & London & Globe Ins. Co. v. Delta County Farmers' Ass'n*, 121 S. W. 599 (Tex. Ct. Civ. App.).

The whole insurance on the cotton in the warehouse is the face value of the policy covering it alone plus the amount for which it may be said to be insured by reason of the second policy. If each policy covered the same property only, this latter amount would be the face value of the second policy. *Farmers Feed Co. of N. J. v. Scottish, etc., Ins. Co. of Edinburgh*, 173 N. Y. 241. The same rule has been applied when the second policy covers additional property. *Page v. Sun Ins. Co.*, 74 Fed. 203. But such a rule would involve the anomalous conception that the blanket policy over-insured the cotton in the warehouse, though it under-insured the aggregate property covered by it. See *Ogden v. East River Ins. Co.*, 50 N. Y. 388, 391. It is submitted that under these circumstances the blanket policy insures the cotton in the warehouse not exceeding its total value. Some courts, indeed, hold that the blanket policy insures it only for that proportion of its value which the face of the blanket policy bears to the value of all the cotton covered. *Ogden v. East River Ins. Co., supra*; 2 PHILLIPS, INSURANCE, § 1263 *a*. In deciding that the cotton inside the warehouse is insured by the second policy for the face value of the policy less the amount of the loss on the cotton outside, the principal case seems indefensible in theory. But see *Meigs v. London Assurance Co.*, 126 Fed. 781. In practice, if enough outside property were destroyed, this rule might prevent the defendant from pro-rating at all.

INSURANCE — RIGHTS OF INSURER — RELEASE OF WRONGDOER BY INSURED. — An insurance company paid the insurance on a building destroyed by fire caused by the defendant's locomotive. With knowledge of this payment, the defendant received from the owner a release from all liability. Subsequently, an action for the benefit of the insurance company was brought in the name of the owner. *Held*, that the release is no bar to the action. *Cushman & Rankin Co. v. Boston & Maine R. R.*, 73 Atl. 1073 (Vt.).

An insurance contract is a contract of indemnity. *Castellain v. Preston*, 11 Q. B. D. 380. And because of its liability to indemnify, an insurance company, immediately after the destruction of insured property, has a beneficial right against a wrongdoer who caused the loss. *Hart v. Western Railroad Corporation*, 13 Met.

(Mass.) 99. Because a release after the loss cuts off this right to a remedy over on payment of the insurance, it discharges the company. *Dilling v. Draemel*, 16 Daly (N. Y.) 104. The insurance company, however, is entitled only to the right the insured had. And if a contract made before loss prevents the insured from suing the wrongdoer, the company has no claim against the latter. *Savannah Fire & Marine Ins. Co. v. Pelzer Mfg. Co.*, 60 Fed. 39. Upon paying the insurance, the company is subrogated to the rights of the insured. *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462. Yet since the claim is still in the name of the insured, it would seem that a release for consideration, given by him to a wrongdoer ignorant of the payment, should be effective. But if the release were gratuitous, it should be set aside. A release taken with knowledge of the payment, as in the principal case, is a fraud on the insurance company and despite consideration is therefore void. *The Monmouth County Mut. Fire Ins. Co. v. Hutchinson, etc., Transportation Co.*, 21 N. J. Eq. 107.

JOINT TENANCY — WHETHER JOINT TENANCY OR TENANCY IN COMMON CREATED. — An owner of a term for years granted it by deed to A and B, "their executors, administrators, and assigns." *Held*, that they take as joint tenants. *Goddard v. Lewis*, 25 T. L. R. 813 (Eng., K. B. D., July 31, 1909). See NOTES, p. 214.

JUDGMENTS — FOREIGN JUDGMENTS — EQUITABLE DECREE AS A CAUSE OF ACTION IN ANOTHER STATE. — In divorce proceedings between A and B, both of whom were before it, a Washington court ordered that B convey to A certain land situated in Nebraska. B fraudulently conveyed the land to C who had notice of the decree. Relying on the Washington decree, A brought a bill in a Nebraska court to quiet title to the land, but was denied relief on the ground that the foreign court had no jurisdiction. *Held*, that the Nebraska decision does not deny full faith and credit to the foreign decree. *Fall v. Eastin*, U. S. Sup. Ct., Nov. 1, 1909.

Justice Holmes, in a concurring opinion, intimates that the foreign decree should have the same effect on the equitable obligations of the parties and their privies as a foreign decree for specific performance of a contract. But he points out that whatever the result reached by the court on this point, the requirements of full faith and credit have been complied with. For a discussion of the principles involved, see 21 HARV. L. REV. 210.

QUASI-CONTRACTS. — NATURE AND SCOPE OF THE OBLIGATION — RECOVERY FROM ESTATE OF MONEY LOANED TO EXECUTRIX. — An executrix, having mismanaged an estate, was forced to borrow money of the plaintiff, in order to pay taxes on realty belonging to the estate. After the executrix became insolvent, the plaintiff sued in equity to recover the loan. *Held*, that he can recover directly from the estate. *Stillman v. Holmes*, 54 Ohio L. Bull. 84, No. 44 (Oh., Franklin County Ct., Sept. 20, 1909).

Since an executor has no authority to borrow money, the plaintiff had no right at law against the estate. *Merchants' Nat'l Bank v. Weeks*, 53 Vt. 115. And since the plaintiff was neither liable for nor interested in the payment of the taxes, he could not have been subrogated to the rights of the tax collector. *Brown v. Hooks*, 65 S. E. 780 (Ga.). But as an executor may ordinarily be reimbursed for money spent for the benefit of the estate, one lending him money has a remedy by way of equitable attachment of the executor's claim against the estate. *Williamson's Appeal*, 94 Pa. St. 231. See 14 HARV. L. REV. 67. But this procedure is impossible in the case under discussion, because an executor by misconduct loses his right to reimbursement. *In re Johnson*, 15 Ch. D. 548. The court, however, seems justified in holding that resort to these derivative remedies is here unnecessary; for since it is unconscionable for the estate to profit at the plaintiff's expense, the estate is under a quasi-contractual obligation to reimburse him.



*Deery v. Hamilton*, 41 Ia. 16. In accordance, however, with the rule that there is no such obligation to repay money paid under a mistake of law, one lending money because of a mistaken notion as to an executor's authority to borrow, cannot recover. *Merchants' Nat'l Bank v. Weeks*, *supra*.

QUASI-CONTRACTS — RIGHTS ARISING FROM MISTAKE OF FACT — PAYMENT IN ANTICIPATION OF A NON-EXISTING LEGAL LIABILITY. — K. & Co. in New York notified the plaintiff in London that they had credited a certain amount to a third party, and requested him to recoup them, according to their prior agreement. Before making any payments to the third party K. & Co. became insolvent. After the insolvency, the plaintiff, in anticipation of his legal liability, deposited the requested amount to K. & Co.'s account with the defendants in London. Later that day he learned of the insolvency and notified the defendants. They had merely made an entry of the credit to the account of K. & Co. K. & Co. were largely indebted to the defendants, who refused to refund to the plaintiff. *Held*, that as the plaintiff paid the money under a mistake of fact, he can recover. *Kerrison v. Glyn, Mills, Currie & Co.*, 26 T. L. R. 37 (Eng., K. B. D., Oct. 28, 1909).

Where money has been paid under a mistake of fact, an action for money had and received will lie. *McLean County Bank v. Mitchell*, 88 Ill. 52. And the payee is liable to refund, even though in ignorance of the mistake he has paid the money to another. *Continental Caoutchouc, etc., Co. v. Kleinwort Sons & Co.*, 20 T. L. R. 403. Though the ground for recovery is usually alleged to be in quasi-contract, the underlying principle of the relief given is equitable. In fact the case is analogous to those where money is received for a particular purpose which fails. See *Cutler v. Am. Exchange Nat. Bank*, 113 N. Y. 593. There the depository becomes liable as a constructive trustee. *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314. And yet an action on the common counts lies. *Ashpitel v. Sercombe*, 19 L. J. Exch. 82. The mistake must be as to a material fact. *Chambers v. Miller*, 13 C. B. N. S. 125. And when the plaintiff paid, he must not have doubted his liability. *McArthur v. Luce*, 43 Mich. 435. His claim rests on the fact that the defendant is being unjustly enriched at his expense. To prove that the enrichment is at his expense, the plaintiff must show a failure of consideration. *Taylor v. Hare*, 1 B. & P. N. R. 260. And to prove that it is unjust, the plaintiff must show that he was neither legally nor morally bound to pay. *Franklin Bank v. Raymond*, 3 Wend. (N. Y.) 69. It is submitted that the above theories are properly applicable to the principal case, which is thoroughly in accord with public policy.

LANDLORD AND TENANT — RENT — STATE INTERFERENCE WITH BENEFICIAL USE OF PREMISES. — Premises were leased for occupation "as a saloon and not otherwise." During the term the sale of intoxicating liquor was prohibited by law. The lessee continued to occupy the premises. The lessor sued for rent which accrued after the prohibitory law had gone into effect. *Held*, that he can recover. *O'Byrne v. Henley*, 50 So. 83 (Ala.).

No rent need be paid after a natural catastrophe has totally destroyed the leased premises. *Graves v. Berdan*, 26 N. Y. 498. *Contra*, *Izon v. Gorton*, 5 Bing. N. Cas. 501. The same is true if the state, by eminent domain, takes title to the whole of the premises. *Corrigan v. City of Chicago*, 144 Ill. 537. After either of these events, the estate demised, out of which the rent is to issue, no longer exists. But by the weight of authority physical damage short of total destruction does not alter the lessee's liability for rent. *Hilliard v. The New York & Cleveland Gas Coal Co.*, 41 Oh. St. 662. By the minority view, the rent under such circumstances is apportioned, on the theory that the diminution of the beneficial use of the premises causes a failure of consideration for the rent. See *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251. But since a lease is not a contract of continuing performance, but the grant of an estate for years, there

is properly no failure of consideration as long as the estate continues. *Hill v. Woodman*, 14 M. 38. Since the lessee's estate is unimpaired, the principal case is clearly right. *Miller v. Maguire*, 18 R. I. 770. Cf. *Parks v. Boston*, 15 Pick. (Mass.) 198. The prevention of unjust results from this doctrine should be left to legislation. Cf. *Snydam v. Jackson*, 54 N. Y. 450.

**LARCENY — PROPERTY SUBJECT TO LARCENY — UNINDORSED CHECKS.** — A statute made checks subject to larceny. The defendant was indicted for larceny of an indorsed check payable to a third party. *Held*, that in determining the value of the stolen property, the face value of the check is to be taken. *State v. McClellan*, 73 Atl. 993 (Vt.).

At common law a check could not be stolen, as it was merely evidence of a chose in action. *Culp v. State*, 1 Port. (Ala.) 33. But this rule has been almost universally changed by statutes applying to all commercial paper. The Vermont statute simply says that one who steals the check of another is guilty of larceny. Vt. P. S. 5755. The guilt of the defendant seems to depend more on the fact that the check is of value to the owner than that the thief would be benefited by it. Thus one who steals an invalid note is not guilty of larceny. *Wilson v. State*, 1 Port. (Ala.) 118. And the same rule applies to the theft of a non-negotiable note given in pursuance of an invalid contract. *People v. Hall*, 74 Hun (N. Y.) 96. But if the instrument would be valid in the hands of some one, it does not seem necessary that the defendant should find it of value. *Phelps v. People*, 72 N. Y. 334. By the statute, the check becomes a thing of value in itself. So in the principal case the defendant, by taking the check, deprived the payee of something of value and was therefore rightly convicted.

**LEGACIES AND DEVISES — TITLE AND RIGHTS OF DEVISEES AND LEGATEES — DIVIDENDS ON SPECIFIC LEGACY ERRONEOUSLY TRANSFERRED.** — A testator made a will bequeathing certain specific shares of stock to the defendants. After probate of the will the shares were transferred by the executors, and the defendants received several dividends thereon. A codicil was later discovered, bequeathing a portion of these shares to the plaintiff. The original probate was revoked, and a fresh probate of the will and codicil granted. The plaintiff now seeks to recover not only his portion of the shares but all dividends received thereon since the testator's death. *Held*, that the plaintiff can recover both shares and dividends. *West v. Roberts*, [1909] 2 Ch. 180. See NOTES, p. 215.

**LIBEL AND SLANDER — PLEADING AND PROOF — LIBEL WITHOUT INTENT.** — A newspaper published an imaginary account of a supposedly fictitious character. The name used was that of the plaintiff, a prominent barrister of the locality, whose friends reasonably believed that he was the person referred to. The defendant did not intend to refer to the plaintiff, and had no intention of libelling any one. The plaintiff brought action for libel. *Held*, that he can recover. *Jones v. Hutton & Co.*, L. R. (1909) 2 K. B. 444. See NOTES, p. 218.

**PATENTS — INFRINGEMENT — CONTRIBUTING TO VIOLATION OF LICENSE.** — The complainant sold patented sealing machines on condition that they be used only with seals made by the complainant, but not protected by patent. The defendant, with knowledge of these facts, sold seals of its own manufacture for use on these machines. *Held*, that the sale can be enjoined. *Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co.*, 172 Fed. 224 (Circ. Ct., E. D., N. Y.).

A patentee may impose restrictions on the use of his product when he sells it. *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424; *Bement v. National Harrow Co.*, 186 U. S. 70. (A different rule prevails as to copyrights. See 22 HARV. L. REV. 228.) Thus a stipulation that all supplies used with a patented machine shall be purchased from the patentee is valid, though the supplies are unpatented. *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77



Fed. 288. Whether or not unpatented "ordinary commodities" may be controlled in this indirect way is doubtful; but the seals in the principal case were held not to be "ordinary commodities." *Cf. Cortelyou v. Johnson*, 145 Fed. 933; *Dick Co. v. Henry*, 149 Fed. 424. The sale of an article to one who uses it in violation of his license is not actionable, if the seller has no notice of the license. *Cortelyou v. Johnson*, *supra*. But one who sells with notice is guilty of contributory infringement. *Rupp & Wittgenfeld Co. v. Elliott*, 131 Fed. 730; *Thomson-Houston Electric Co. v. Kelsey Electric Ry. Specialty Co.*, 75 Fed. 1005. So liability is primarily dependent on knowledge. The courts have not made it clear whether the wrong consists in inducing the breach of a contract or in acting in concert with a tortfeasor. See *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, *supra*; *Tabular Rivet & Stud Co. v. O'Brien*, 93 Fed. 200; *Dick Co. v. Henry*, *supra*. The principal case, however, may be supported on either theory, and its result, though practically allowing a monopoly in an unpatented article, accords with previous decisions. See 12 HARV. L. REV. 35; 21 *ibid.* 150.

**PUBLIC OFFICERS — ELIGIBILITY TO OFFICE — INCOMPATIBLE OFFICES.** — *Held*, that the mayor of a city does not vacate his office by acting as a member of Congress. *Ohio v. Gebert*, 12 Oh. Cir. Ct. R. N. S. 274.

At common law one person can hold two offices unless they are incompatible. *Preston v. United States*, 37 Fed. 417. Offices are said to be incompatible when their duties are so numerous and exacting that the same person cannot perform them with ease and ability, or when they are so related that a presumption fairly arises that they cannot be executed by the same person with impartiality and honesty. See 6 BACON'S ABRIDGMENTS, Tit. Offices (K). Incompatibility does not consist in the physical impossibility to discharge the duties of both offices at the same moment. *People v. Green*, 58 N. Y. 295. But see *South Carolina v. Butts*, 9 S. C. 156. But if one office is subordinate to the other, or if one is subject in some degree to the revisory power of the other, or if the functions of the two are inherently inconsistent and repugnant, they are incompatible. *State v. Goff*, 15 R. I. 505. In the present case, the laws enacted by Congress do not affect the powers and administration of the office of mayor, nor is the administration of the office of mayor subject to the review of Congress. Therefore the offices are not incompatible, and the acceptance of the second does not *ipso facto* operate as a surrender of the first. *Bryan v. Cattell*, 15 Ia. 538.

**RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — STANDARD OIL COMPANY'S CASE.** — The majority stock of twenty formerly competitive corporations, engaged in interstate commerce and in turn controlling many smaller companies, was jointly owned by the former holders of certificates in a previous trust. The majority stock of nineteen of these corporations was transferred in exchange for the stock of the twentieth, the Standard Oil Company of New Jersey, the capital stock of which was increased and the charter amended for this purpose. The business was then conducted by this corporation as a single enterprise. *Held*, that the transaction constitutes a combination in restraint of, and to monopolize, interstate commerce in violation of § 1 and § 2 of the Sherman Act. *U. S. v. Standard Oil Co. of N. J.*, 173 Fed. 177 (Circ. Ct., E. D. Mo., Nov. 20, 1909). See NOTES, p. 209.

**RULE AGAINST PERPETUITIES — RULE AGAINST POSSIBILITY OR POSSIBILITY EXTENDED TO EQUITABLE ESTATES.** — An estate in trust under a settlement was appointed to unborn children for their lives, with a remainder to the children of such children. The appointment under the devise satisfied the rule against perpetuities. *Held*, that the appointment is invalid. *In re Nash*, [1909] 2 Ch. 450.

This decision is an application of a rule of law affecting the validity of contingent remainders, to equitable estates analogous to contingent remainders. In

general, a court of chancery, allowing beneficial interests in land similar to legal estates, follows the law in regard to the limitation of such legal estates, unless the strictly legal questions of tenure or seisin are involved. See *Burgess v. Wheate*, 1 Eden, 177, 223. Thus the rule in Shelley's case defeats the intention of the grantor of equitable estates, if the conditions for the application of the rule are satisfied. *Webb v. The Earl of Shaftesbury*, 3 M. & K. 599. And the operation of the rule against perpetuities limits the creation of remote equitable estates. *In re Finch*, 17 Ch. Div. 211, 229. Therefore the rule against "double possibilities," which will not allow, after a limitation to an unborn person for life, a remainder to his unborn children, is treated in the principal case not only as subsisting, but as "embodying a useful and intelligent restraint." Hence it is unnecessary to review the adverse criticism to which this legal rule, now well established in England, has been subjected. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 124-134, 191-199, 285-298; 16 HARV. L. REV. 294.

SALES — RIGHTS AND REMEDIES OF BUYERS — RE-SALE ON ACCOUNT OF SELLER. — The buyer notified the seller that he would not accept paper delivered by a carrier, as it was not the kind ordered. Receiving no instructions as to the disposal of the paper, the buyer, after notice to the seller, sold the paper on account of the latter. *Held*, that the seller is entitled to recover the contract price. *Estes v. Conestoga Paper Co.*, 26 Lan. L. Rev. 348 (Pa., C. P. Lancaster County, July 10, 1909).

The buyer need not accept goods of a description different from those ordered; for he is not bound to accept what he did not agree to buy. *Pope v. Allis*, 115 U. S. 363; *Vigers Brothers v. Sanderson Brothers*, [1901] 1 K. B. 608. Since the goods have been thrust upon him, he is not even obliged to return them, if he notifies the seller that he rejects them. *Grimoldby v. Wells*, L. R. 10 C. P. 391. But acts of dominion, even after notice of rejection, generally prove the buyer's intent to take title to the goods as offered. *Cream City Glass Co. v. Friedlander*, 84 Wis. 53. On this ground a re-sale by the buyer renders him liable for the contract price. But if the re-sale is made unequivocally, and with legal authority, on account of the seller, payment of its net proceeds discharges the buyer. *Barnett & Co. v. Terry & Smith*, 42 Ga. 283. The legal authority to re-sell has been described as an agency implied by necessity. See *Strauss v. National Parlor Furniture Co.*, 76 Miss. 343. It is more accurately explained as being attached by law to the buyer's position of involuntary bailee, to be exercised diligently whenever reasonably necessary to diminish the seller's liability for storage charges. It should not be arbitrarily restricted, as in the principal case, to instances of perishable goods. See *Rubin v. Sturtevant*, 80 Fed. 930. *Cf. Strauss v. National Parlor Furniture Co.*, *supra*.

TRUSTS — RESULTING TRUSTS — EFFECT OF ANNULMENT OF MARRIAGE UPON PRESUMPTION OF ADVANCEMENT TO WIFE. — A husband purchased a house in the joint names of himself and wife, telling his wife that it was intended for their joint habitation and would ultimately belong to the survivor. Subsequently, the wife obtained a decree declaring the marriage "to have been and to be" null and void. *Held*, that the wife holds her interest as an advancement, and not subject to a resulting trust for the husband. *Dunbar v. Dunbar*, 26 T. L. R. 21 (Eng., Ch. D., Oct. 21, 1909).

It has always been undisputed law that the Statute of Frauds does not prevent a resulting trust when A supplies the consideration for land conveyed by B to C. *Ex parte Vernon*, 2 P. Wms. 549. And it has been equally well settled that the presumption of a trust is displaced by the presumption of an advancement when C is the child or wife of A. *Mumma v. Mumma*, 2 Vern. 19; *Dummer v. Pitcher*, 2 Myl. & K. 262. But the presumption in either case is not conclusive, and parol evidence is admissible to show the real intent. *Faylor v. Faylor*, 136 Cal. 92. The presumption of an advancement for the wife persists despite



a decree of divorce. *Thornley v. Thornley*, [1893] 2 Ch. 229. But it is destroyed, if the husband knew that the marriage, owing to consanguinity, was illegal. *Soar v. Foster*, 4 Kay & J. 152. The present case of a voidable marriage stands midway between a divorce and an illegal marriage. Since the question at issue is simply the intent with which the husband purchased the property in his wife's name and since the presumption is merely one of fact respecting the intention, the principal case correctly decides that a subsequent annulment of the marriage does not affect the presumption.

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## BOOK REVIEWS.

A CODE OF THE LAW OF ACTIONABLE DEFAMATION, with a Continuous Commentary and Appendices. By George Spencer Bower, K. C. London: Sweet and Maxwell, Limited. 1908. pp. 1, 608.

In view of the excellence of Dr. Odgers' Treatise on Libel and Slander, the first impression of many lawyers will be that there is, at the present time, no place left to be filled by another English work on Defamation. But an examination of Mr. Bower's new book shows it to be a useful companion to the work of Dr. Odgers. The present publication is arranged on an entirely different system from the ordinary legal text-book; affording space for a more extended discussion of fundamental principles as well as of legal nomenclature.

The Code Proper occupies a comparatively small part of Mr. Bower's book.

The office of the first part of the volume is to state the law as now held in England. This is done by putting at the top of the page the Articles of the Code; and inserting beneath notes (or as the author calls it — a Continuous Commentary) giving, and sometimes criticizing, the principal authorities.

The second part, which occupies nearly half the volume, is made up of Appendices; *i. e.*, a series of essays discussing with a free hand the existing law; suggesting some changes in substance and more in legal terminology. Many of these discussions and suggestions are of great value.

Infinite labor has been expended by the author in framing the Articles of his Code. So far as we can judge, no important point is omitted; and there is seldom any ground of objection to the substance of the statements.

As to the arrangement, style, and clearness of the Code, few persons are competent critics. No one, who has not himself attempted a similar task, can fully appreciate the difficulties. Legal instructors, who have tried to formulate the law for the benefit of their students, know that the results are likely to be only approximately correct. With diffidence, we suggest that, if Mr. Bower has erred, it is on the side of fulness of statement. There are some long and involved sentences, the meaning of which is not immediately apparent; and his favorite phrase, "if, but not unless," is sometimes interpolated in a way likely to confuse the reader. If the author, following the example of the framers of the Indian Codes, had inserted illustrative examples after each Article, the difficulties in the way of framing exact illustrations might sometimes have led to a revising and recasting of the language of the Articles themselves.

As to the style and clearness of the essays (or Appendices) as well as the notes to the Code, every one must entertain a favorable opinion. The author, who took high honors at Oxford, is a scholar as well as a lawyer. The Appendices, besides containing excellent discussions of legal questions, are, in some cases, fairly bubbling over with apposite quotations and illustrations from the classics and from English literature. See pp. 380-383, 387, 393-395, 397, 399, 417-422.

In some instances "new terminology" is introduced into the Code; and in the Appendices the author attempts to justify, in each of these cases, "the substitution of a novel term for the one in current use." P. 487. He says: "I have not adopted a single new expression for the mere sake of innovation. . . . In every case the motive for rejecting the current phrase is its tendency to confusion of thought." Preface, viii. "The truth is that terminology reacts on thought." P. 487.

Of these changes in legal nomenclature, all of which deserve careful consideration, the one which strikes us as the most useful is the substitution of the phrase "Defeasible Immunity" for "Qualified (or Conditional) Privilege."

This, however, is only a part of a larger scheme of classification and terminology.

The author uses the general term "immunity" to cover "two genera," "each genus having two species." Under "Absolute Immunity" he puts "Defense of Truth," and what is commonly termed "Absolute Privilege." Under "Defeasible Immunity" he includes "Fair Comment," and the cases which are ordinarily classified under "Qualified (or Conditional) Privilege."

He thinks that "Justification" is not an appropriate term to describe the defense of truth; "for the defendant there escapes, not on his own merits, but on the demerits of the plaintiff." P. 359. "Justification" should not be "treated as something *sui generis*," but should instead be "given its proper place as a form of absolute immunity." P. 363.

He discards "privilege" as an inaccurate and misleading term in this connection. His reasons in brief are as follows:

In the law of defamation the meaning of the term "privilege," as recently used, is "that a person stands in such relation to the facts of the case that he is *justified* in saying or writing what would be slanderous or libellous in any one else, or in himself but for his standing in such relation. In other words, *any member of the public*, given the existence of the facts and his 'relation' thereto, is *entitled* to speak and write freely that which, in the absence of those facts and that relation, *no member of the public* would be allowed to speak or write. . . ." P. 342. This is entirely inconsistent with the idea connoted by the word privilege "in other provinces of law than defamation," or even in ordinary parlance. The usual meaning of privilege "is a favor conferred by a special law, over and above the ordinary law, upon a specific individual, or a member of a particular family, profession, class, or a holder of a particular office, simply in virtue of his being that individual, or belonging to that family, profession, or class, or holding that office, and for no other reason. This special and peculiar right the privileged person or class holds at all times, and no one other than the person, or outside the class in question, has any such right at any time. Whereas, in the other kind of case" (so called "privilege" in the case of defamation) "the right is utterly independent of personality, and is not a right in excess of the ordinary law. It belongs to each and every subject of the King, whenever the requisite conditions come into being. In the one case the right exists in virtue of the person, irrespective of the occasion; in the other, it exists in virtue of the occasion, irrespective of the person." P. 343. That which is called "privilege" in the law of defamation "is (1) not in excess of the law of the land, but part of it, and (2) a liberty or freedom which is the right of no one until the necessary conditions exist, and of every one when they do." P. 345.

Whichever expression is used, whether "Privilege" or "Immunity," the prefix "Defeasible" seems preferable to either "Qualified" or "Conditional," especially as being less likely to engender erroneous notions as to the burden of proof. As Mr. Bower points out, "Qualified" imports the notion of circumscription or limitation as to the creation or existence of a *primâ facie* immunity; and so "Conditional" suggests the idea of a condition precedent to the creation of a *primâ facie* immunity. It is true, no doubt, that certain facts must be shown to exist and that the plaintiff must stand in a certain relation to such facts, in order



to create a *primâ facie* immunity. But when these things are once made to appear, then a *primâ facie* immunity exists; subject to be defeated only by the introduction of evidence by the plaintiff to prove new and distinct facts; *e. g.*, want of honest belief, or wrong motive, on the part of defendant. The step to be taken to overthrow the *primâ facie* immunity "is a destructive one by the plaintiff, and not a supplementary constructive one by the defendant." "That which destroys the defeasible immunity, or may destroy it, — that, in fact, which distinguishes it from the absolute kind of immunity, — is a condition subsequent." Pp. 359, 360.

These incorrect phrases "qualified" and "conditional" may be, to some extent, responsible for the continuance of "a wholly unnecessary practice in pleading; viz., 'the practice of inserting in a plea of defeasible immunity ('qualified privilege') an allegation that the defamatory matter was published in good faith, without malice, and in the honest belief that it was true, not one of which facts is there any burden on the defendant, either to allege or to prove, as has been solemnly decided over and over again." P. 490.

Although the expression "fair comment" is retained in the Code, the author believes that the epithet "fair" is needless, if not positively harmful. "Fair comment" in his view, "means nothing more than 'comment,' *scilicet*, that which is really and exclusively comment — that which is not *ex facie* something else, or does not convict itself, on production, of adulteration." P. 119 note (l). In reality, "it comprises a series of negatives," though some of those negatives may be "expressed in a positive form." "'Fair comment,' in fact, is like the Irishman's notion of a net, — 'a lot of holes tied together with string.' Criticism, it is now well settled, in order to entitle itself to any immunity, must (1) *not* be based on facts falsely stated, (2) *not* introduce new facts in the course, and under the guise, of comment, (3) *not* impute personal motives of an evil sort, and (4) *not* express an opinion which is not the critic's real opinion; further, even if, on the face of it, it does not purport to contain any of these elements, its *primâ facie* immunity may be taken away by proof of malice, for, in that case, the plaintiff has a right to say: 'What care I how fair [it] be, If [it] be not fair to me?' Now what does the above come to? Simply to this, that the alleged comment must be wholly and solely comment *ex facie*, 'unmixed with baser matter,' and (if, but not unless, this question is raised by the plaintiff) must have been unprompted by malice. In so far as facts are stated as the basis of the criticism, or allegations of fact are introduced in the course of it, or personal imputations are made not arising out of it, the pretended criticism is not criticism at all. It is not a question of its title to the epithet 'fair,' or to any other epithet: it does not answer to the description of 'comment,' and is defamation pure and simple." P. 388. The mere fact that, "from a literary, artistic, or intellectual point of view," it is unsound or irrational, "does not prevent the comment being 'fair,' if *morally* fair." Pp. 119, 120, 168 note (k).

Mr. Bower devotes some space to the consideration of "Certain unnecessary or illogical practices in pleading." Appendix xxi, Section 3. He begins by saying "Nobody at the present day is much concerned for accuracy in pleading, and so far as mere errors in form are corrected by liberality in amendment, this is as it should be: but none the less, as in the case of terminology, words react on thoughts, and illogical and incorrect practices in pleading tend, first, to encourage, and then to perpetuate, false doctrines as to the substantive principles of the law, particularly such vital questions as, for instance, the burden of proof." One of his instances of wholly unnecessary practices in pleading is, "the practice of averring both falsity and malice in the statement of claim, neither of them being part of the cause of action." P. 490. See also Appendix ii: "Malice and Falsity not connoted by Defamation." Pp. 271-276.

J. S.

SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY. Volume III. By various authors. Compiled and edited by a committee of the Association of American Law Schools. Boston: Little, Brown and Company. 1909. pp. vi, 862.

With this volume the editors of "The Select Essays" have completed a voluntary task that has occupied more than three years. It remains to make some comment on their work as editors and on the volumes as a whole.

Their chief work was to select out of the field of magazine literature such articles as would give a connected account of the fundamental conceptions and institutions of the law from the historical standpoint. To do this has called for tact as well as learning. The result has met with general approval. The seventy-six essays fill some twenty-five hundred pages, — a thousand more than are in the three volumes of Holdsworth's History. In time they range from Chancellor Kent's letter in 1804, to 1908, although all but five were published within the past twenty-five years. Thirty-eight are by twenty-three English writers, thirty-six are by twenty-six Americans, and one each by a Frenchman and a German. One woman is represented. The editors have added several useful appendices and numerous biographical notes, and their prefaces are delightful in themselves and by contrast with the formal essays. To search the magazines, to weigh the possible selections, to choose and combine them so as to make a mosaic that should picture the long procession of topics in historical sequence and in due proportion, has been so well done as to justify the warmest praise.

Valuable as is the result of their labor evidenced by these substantial volumes, still it may be doubted whether the expectations of the chief promoter of the enterprise have been fully realized. When the idea was broached it was hoped that such articles could be found as would provide a text book on legal history for use in a special course of study in the schools, and it was hinted that this might be on the plan of a case book. In fact, the available material had to be supplemented by a considerable percentage from standard works, and the result cannot for a moment, as a text book, compare with Holdsworth, if one is looking for a systematic exposition. As a text book on the plan of a case book it is apparent that the series can make no claim. That the editors have failed in this regard is due to the dearth of suitable material.

It is also doubtful if these volumes will stimulate study more than if not reprinted. But if sufficient copies are provided they will be of service for convenient reference.

But in one other respect the enterprise has been worth while. During the latter part of the nineteenth century, writers were in a hurry. Their haven was the magazine, and the magazine was the repository of half-developed truths. It is worth while to realize from these volumes that this reproach is not true of law magazines. No one can fail to be impressed with the deep research, the deliberate construction, and the substantial worth of these essays. Again, this taking account of the labors of legal scholars for twenty-five years past is in itself a useful experiment, and the marshalling of the best they have thought and said will furnish an inspiration from which all should profit.

This is not the place to comment on these familiar essays. They are known of all men who take interest in the progress of sound learning. One feels in turning these pages that after all the narration of legal history is not an exception to the great law of progression that is seen in other fields of learning.

In conclusion one is tempted to say of these volumes, as the greatest of all law editors once said at the close of his labors: "There is nothing herein but may either open some windowes of the Law, to let in more light to the student by diligent search to see the secrets of the Law, or to move him to doubt, and to enable him to inquire and learne of the Sages what the Law together with the true reason thereof is."

N. A.



**THE LAW OF EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION.** Fourth Edition. By Thomas Beven. London: Stevens and Haynes. 1909. pp. lxxxiv, 953.

The genesis and history of this work are recounted at some length in the Preface; and recounted entertainingly, as those who are familiar with the author's style would expect. It is called a fourth edition, but the treatise before us is substantially a new book, and quite up to date.

It is divided into three parts. The first, occupying about one hundred and twenty pages of the text, deals with "Employers' Liability at Common Law." This liability is set forth in a series of propositions, accompanied by illustrations, much in the form of a draft for a code. As a result, we have a condensed but lucid statement of common-law principles applicable to the relation of master and servant.

Part second is devoted to the Employers' Liability Act of 1880, and fills nearly two hundred pages. While some of the principles peculiar to this branch of the subject are epitomized in propositional form, this portion of the work consists mainly in a running commentary on the important provisions of the statute. In fact, the author attempts, here, to do little more than collate, digest, and criticize decisions which have been evoked by this legislation. It is interesting to compare these decisions with those relating to the law of master and servant before the statute was passed. Now the court is commonly compelled to direct its attention primarily to the construction of statutory language. Is a vicious horse, which is supplied by an employer for use in his business, a defective "plant,"<sup>1</sup> within the meaning of that term in the Act? This is a fair illustration of the questions now brought before the courts for determination. Formerly, the decisions turned, not upon the sense in which a particular word was to be understood, but upon the correct legal principle to be applied to the facts and circumstances of the particular case.

Part third is given up to the Workmen's Compensation Act of 1906, and has the lion's share of the volume—about six hundred pages. This includes an appendix of two hundred pages; an appendix of unreasonable size, the author declares, because of "the peddling pedantries of indefinite code making." He assures us that

"The Workmen's Compensation Act was at first intended to be so simple that a workman, without aid of counsel or solicitor, should be able to get the advantage it gives him from his employer. To work out this object, a power to make rules is given to a body of County Court judges. This first effort in simplifying produced eighty-five rules, some of which meander through pages of print, and are made, if it were possible, more intolerable by sixty-seven forms attached to them by way of appendix. Then, within a twelvemonth, pages more of rules and forms are produced. The Treasury joins in showering its benefit of rules on the workman, and so does the Home Secretary, and so do the Treasury and Home Secretary jointly, and so does the Registrar of Friendly Societies."

It is this network of statute, by-laws, and regulations which is now being dangled before the eyes of American legislators, as proof of the assertion that we are woefully behind the times. Whether this volume will convince such legislators that they ought to follow the example of the British Parliament and enact a workmen's compensation statute is doubtful. Certainly, Mr. Beven makes no secret of his view that the Act of Parliament in question is a huge blunder. In his opinion it "does not readily lend itself to the application of familiar legal principles. The method of dealing with 'serious and wilful misconduct,' 'industrial diseases,' and in this connection with fraudulent misrepresentation 'not in writing,' 'illegitimate children,' 'casual employment,' 'concurrent contracts,' to mention only a few features, requires a faculty of mental adjustment, perhaps

<sup>1</sup> *Yarmouth v. France*, 19 Q. B. D. 647, 57 L. J. Q. B. 7.

not ordinarily possessed, save by the philosophers of the Trade Unions or politicians panting for a seat in Parliament on any terms. The note of all this," adds our author, "seems not inaptly summed up in the formula, 'The real friend is Codlin, not Short.'"

One of the objects of the framers of this Act was to eliminate formal legal proceedings and to substitute therefor conciliation committees and private arbitrators, in case of injuries to workmen in the course of their employment. And yet, Mr. Beven declares, "the convenience of the County Court procedure has been recognized to an extent that is almost universal."

We commend the entire volume to the careful perusal not only of every lawyer, but of every citizen who is interested in the progressive tendency to make the relation of master and servant a matter of state regulation.

F. M. B.

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THE FIXED LAW OF PATENTS, as Established by the Supreme Court of the United States and the Nine Circuit Courts of Appeals. By William Macomber. Boston: Little, Brown and Company. 1909. pp. cxlv, 925.

The object of this book of some nine hundred pages is to set forth the fixed law of patents, and for this purpose the author has confined himself to the decisions of the ultimate appellate tribunals, the United States Supreme Court and the Courts of Appeal. The task which Mr. Macomber has set for himself is an ideal one, but almost impossible to perform because of the nature of the subject; for in Patent Law a mass of ancillary law has been built up by the decisions of the courts, which is true when applied to the particular cases and the patents involved, but which is not to be applied to a different state of facts. The task is also difficult because even the law which may be regarded as fixed is not in fact fixed. Two striking instances of the danger of assuming that any principle in the Patent Law is fixed except the foundation statutes, are represented by decisions of the Supreme Court during the past year. In *Leeds & Collin v. Victor Talking Machine Co.*, 213 U. S. 301, the Supreme Court held that under section 4887 of the Revised Statutes one claim of a patent might expire with a prior foreign patent, whereas the other claims might continue as a monopoly for seventeen years, thus overruling the *dicta* to the contrary in *Siemens v. Sellers*, 123 U. S. 276. And in *Expanded Metal Co. v. Bradford*, 214 U. S. 366, the Supreme Court sustained a patent for a process the steps of which were all mechanical and did not involve any chemical or other elemental action, thus apparently setting at rest the doubt as to the patentability of mechanical processes raised by the case of *Risdon Works v. Medart*, 158 U. S. 68. Moreover many holdings and even *dicta* of the lower courts have become fixed law by general acceptance. A notable example is the rule of priority of invention laid down by Judge Story in *Reed v. Cutter*, 1 Story 590. The character of the court does not fix the law, but it is fixed by its own inherent rightfulness.

Mr. Macomber begins his book with a brief survey of his subject wherein the matter is divided into headings, which arrangement is followed in the body of the work. Under the admirable classification and sub-classifications of subjects the author has quoted the language of the appellate courts on the points involved. It would perhaps have made the task of the reader more easy if he had placed in quotation marks the language quoted, so as to separate the remarks of the court from the author's own summing up or digest. The reader is obliged to exercise care in order to distinguish between them.

Of course, where the remarks of the courts are so extensively quoted as in this work it is practically impossible to distinguish between those parts which form the actual decision of a case and those parts which are either *dicta* or the contributing principles underlying the final decision. Nor is it always safe to



assume that the author is correct in his digest of the courts' holding. For instance, a remark of the Circuit Court of Appeals for the First Circuit in *Mayo v. Jenkes*, 133 Fed. 527, refers to the fact that the patent in suit was held in the Patent Office, and the claims in suit so drawn as to cover the defendant's structure which appeared on the market during the progress of the application. Mr. Macomber refers to this as a most important and far-reaching holding. A careful examination of the decision shows that it was not held that these claims were an improper amendment, but that the invention of the patent in suit was of such a character as to require so narrow a construction as to exclude the defendant's device. Possibly the way the application had been amended might have been a contributing cause to the decision of the court, but the court does not so state.

The book in fact appears to be a well arranged and orderly digest of an elaborate character, where the exact language of the appellate courts on all subjects in the law of patents can readily be found. It is therefore a valuable and useful work for the practicing patent lawyer. Like other less elaborate digests, however, the cases from which extracts have been made should be read before these extracts are accepted as the ultimate decisions of the courts and before the author's criticisms are blindly followed.

The book contains a table of cases excerpted with annotations and another table of cases cited, which include many decisions of the lower courts, a very helpful addition. Near the end is a digest of the Patent Statutes, the ultimate foundations of the Patent Law which are frequently overlooked. A systematically arranged general index completes the work.

J. L. S.

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**BRIEF MAKING AND THE USE OF LAW BOOKS.** By William M. Lile, Henry S. Redfield, Eugene Wambaugh, Edson R. Sunderland, Alfred F. Mason, and Roger W. Cooley. Second Edition. Edited by Roger W. Cooley. St. Paul: West Publishing Company. 1909. pp. xii, 574.

This book is intended primarily for the young law school graduate. Parts of it are necessarily very elementary. But Professor Wambaugh's careful essay on Decisions and Statutes might well find a place in a far more advanced work. Moreover, the clues furnished by Mr. Cooley will not come amiss to those who feel that the average digester "moves in mysterious ways his wonders to perform." Yet the book will probably be used chiefly by the young graduate who finds himself loaded to the muzzle with the theory of the law and also uncertain how to discharge that theory to the adversary's damage.

E. H. A. JR.

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**THE LEGISLATION OF THE EMPIRE.** A Survey of the Legislative Enactments of the British Dominions from 1808 to 1907. Edited by C. E. A. Bedwell. In four volumes. London: Butterworth and Company; Philadelphia: Cromarty Law Book Company. 1909. pp. xxxv, 545; x, 482; x, 528; 231.

**THE EVOLUTION OF LAW.** A Historical Review. By Henry W. Scott. Third Edition. New York: Wilson Publishing Company. 1908. pp. 165.

**THE COURTS OF THE STATE OF NEW YORK.** Their History, Development, and Jurisdiction. By Henry W. Scott. New York: Wilson Publishing Company. 1909. pp. 506.

**EQUITY.** Also the Forms of Action at Common Law. Two Courses of Lectures. By F. W. Maitland. Cambridge: at the University Press; New York: G. P. Putnam's Sons. 1909. pp. xvi, 412.

- A MANUAL OF MEDICAL JURISPRUDENCE. By Marshall D. Ewell. Second Edition. Boston: Little, Brown, and Company. 1909. pp. x, 407.
- CLASSICS OF THE BAR. Stories of the World's Great Jury Trials and a Compilation of Forensic Masterpieces. By Alvin V. Sellers. Baxley, Georgia: Classic Publishing Company. 1909. pp. 314.
- A BRIEF HISTORY OF THE MIDDLE TEMPLE. By C. E. A. Bedwell. London: Butterworth and Company. 1909. pp. vi, 132.
- GENERAL THEORY OF LAW. By N. M. Korkunov. Translated by W. G. Hastings. Boston: The Boston Book Company. 1909. pp. xiv, 524.



# HARVARD LAW REVIEW.

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VOL. XXIII.

FEBRUARY, 1910.

NO. 4.

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## FEDERAL CONTROL OF INTERSTATE COMMERCE<sup>1</sup>

FROM an early day our English forefathers were strenuous advocates of freedom of commerce. The forty-first article of Magna Charta provided:

"All Merchants shall have safety and security in coming into England, and going out of England, and in staying and in traveling through England, as well by land as by water, to buy and sell, without any unjust exactions, according to ancient and right customs, excepting in the time of war, and if they be of a country at war against us: and if such are found in our land at the beginning of a war, they shall be apprehended without injury of their bodies and goods, until it be known to us, or to our Chief Justiciary, how the Merchants of our country are treated who are found in the country at war against us; and if ours be in safety there, the others shall be in safety in our land."

The Declaration of Independence enumerated, among those acts of tyranny which entitled our people "to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them," . . . the "Cutting off our trade with all parts of the world."

The Articles of Confederation, entered into by the states on November 15, 1777, secured to the citizens of each state the right to carry on trade and commerce with other states, but left each state free to impose such impositions, duties and restrictions on trade and com-

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<sup>1</sup> This article is a revision of a portion of an address delivered by the writer before the Commercial Club of Kansas City, Mo.

merce as it might choose, provided the same should apply equally to its own citizens as to those of other states, and provided they did not interfere with stipulations in treaties duly made under the Articles of Confederation.

Commerce is the life blood of a nation. The arteries through which it flows, like those of the animal kingdom, cannot be obstructed but congestion sets in, disease develops, and healthy life is impossible. After the confederation, as the historian Schouler says:

"The commercial states obstructed the non-commercial; and New Jersey, lying between two such great ports as New York and Philadelphia, was likened to a cask tapped at both ends. Without authority to regulate commerce, Congress found the treaty-making power conferred upon it of little practical avail."

Each state imposed duties and imposts according to its own ideas of its own advantage. Connecticut taxed Massachusetts' imports higher than the British.

"This downward course of things in America," says Schouler, "arrested the attention of thoughtful citizens. It was quickly perceived that, unless Congress should procure two things, the authority to regulate foreign commerce and power to collect a federal revenue, the situation was desperate."

This state of things brought about the great convention in Philadelphia, where the counsels of the wise men prevailed, and the new Constitution was framed "in order to form a more perfect Union." It vested the national Congress with the broad, comprehensive power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"; and

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

It forbade the states "without the consent of the Congress" to "lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, . . . and all such laws shall be subject to the revision and control of the Congress."

The grant of authority to regulate interstate and international commerce secured to the national government a power immeasurable in its extent and indescribable in its importance.



The framers of the Constitution, with that marvelous prescience which characterized their work, placed in the hands of the national government the exclusive power to regulate commerce between the states and with foreign nations without qualification or restriction. It was really the power to preserve national existence.

The acts of Congress providing for the creation of states out of the territory lying north of the Ohio River directed the setting apart of a portion of the net proceeds of the sale by Congress of public lands lying within those states to defray the expenses of laying out and making public roads leading from the navigable waters emptying into the Atlantic to the Ohio River, and through those states, with the consent of the states through which the roads should pass. Under these acts, beginning in 1808, Congress made appropriations for building what was known as the Cumberland Road, from the Potomac River to the Ohio, and its extension through the states of Ohio, Indiana, and Illinois to the Mississippi.

This highway entailed great expense, and the numerous applications for money for that purpose aroused considerable opposition in those states not directly benefited by it. In 1822 a bill was passed providing for the erection of toll gates on the Cumberland Road, and the collection under national authority of tolls for passage over it. President Monroe, however, vetoed the bill on the ground that it was of doubtful constitutionality, and transmitted to Congress with his veto an elaborate memorandum in which he contended that the constitutionality of the act could not be sustained under the grant to Congress of the power "to regulate commerce among the states."

"Commerce between independent Powers or communities," he said, "is universally regulated by duties and imposts. It was so regulated by the States before the adoption of this Constitution, equally in respect to each other and to foreign Powers. The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other. A power, then, to impose such duties and imposts in regard to foreign nations and to prevent any on the trade between the States, was the only power granted."<sup>1</sup>

In striking contrast with this narrow conception of the scope of the power granted was the opinion of Chief Justice Marshall, rendered two years later, in deciding that an act of the legislature of New York, granting to Robert R. Livingston and Robert Fulton for a term of years the exclusive navigation of all the waters within the

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<sup>1</sup> Annals of Congress, 17 Cong. 1st Sess., Vol. 39, p. 1833.

jurisdiction of that state with boats moved by fire or steam, was invalid because of the Commerce Clause in the Constitution, so far as such act prohibited vessels licensed under the laws of the United States to carry on the coasting trade, from navigating the waters of the State of New York by means of fire or steam.<sup>1</sup>

President Monroe's theory that the only power granted by the Constitution was to impose duties and imposts with regard to foreign trade and to prevent any on interstate commerce was brushed ruthlessly aside. The subject to be regulated, said the Chief Justice, is commerce. "Commerce undoubtedly is traffic, but it is something more: it is intercourse." It comprehends navigation. It comprehends every species of commercial intercourse among the states and between the United States and foreign nations. "It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."<sup>2</sup>

The power granted, he declared, was to regulate, — that is, to prescribe the rule by which commerce is to be governed. "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."<sup>3</sup> It is a fact of much significance that the first great interpretation of this power to regulate interstate commerce should have been given in holding invalid, as contrary to its provisions, an attempted state grant to individuals of a monopoly in steam navigation over the waters of the greatest commercial state of the Union.

Only three years after this decision the Supreme Court declared invalid, as contrary to the constitutional prohibitions against the laying by the states of imposts or duties on imports or exports, as well as of the grant to Congress of power to regulate interstate commerce, an act of the State of Maryland requiring, under penalty, all importers of foreign goods and persons selling the same to take out a license.<sup>4</sup>

The power to regulate interstate commerce, said Chief Justice Marshall,

"is coextensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior. . . . If this

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<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1.

<sup>2</sup> *Ibid.* 189.

<sup>3</sup> *Ibid.* 196.

<sup>4</sup> *Brown v. Maryland*, 12 Wheat. 419.



power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. . . . Congress has a right, not only to authorize importation, but to authorize the importer to sell."<sup>1</sup>

After President Monroe's veto of the Toll Bill, Congress adopted a policy of gradual abandonment to the states of the control of the Cumberland Road, and ultimately surrendered to them all of its interests therein.

Not until the year 1862, did Congress undertake again to exercise the power to regulate interstate commerce by aiding in the construction of interstate highways. In that year the first of the acts to incorporate the Union Pacific Railroad for the construction of a trans-continental line of railroad was passed. This was followed in rapid succession during the next few years by acts incorporating the Northern Pacific Railroad Company, the Atlantic and Pacific Railroad Company, and the Texas and Pacific Railroad Company, to construct other lines of railroad across the continent.

Care was taken in some of these acts not to offend the susceptibilities of the states by the assertion of exclusive national control. The original Union Pacific line ran wholly through territories of the United States. The line of the Northern Pacific Railroad, however, ran through some of the states, and the Act of Congress by which it was incorporated required it to obtain the consent of the legislatures of the states through which it might pass previous to commencing the construction thereof, although authorizing it to put on engineers and survey the route before obtaining such consent. No such condition was imposed in the act creating the Atlantic and Pacific Railroad Company; but that corporation was expressly authorized by Congress to construct and maintain a continuous line of railroad from Springfield, Missouri, to Albuquerque, New Mexico, and thence to the Pacific, with a branch in the State of Arkansas; and for that purpose was authorized to enter upon and condemn such lands as might be necessary. The same policy was observed in the incorporation of the Texas and Pacific Railroad

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<sup>1</sup> *Ibid.* 446-447.

Company. The constitutionality of all these acts was upheld by the Supreme Court.

By the Act of 1862, Congress authorized the Central Pacific Railroad Company of California to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, to the eastern boundary line of California, and also authorized the Central Pacific to unite with the Union Pacific in constructing the railroad from California to the Missouri River. By consolidations also authorized by Acts of Congress, the Central Pacific Company acquired some of its most important franchises.

In holding that these franchises could not be taxed by the State of California, the Supreme Court, speaking by Mr. Justice Bradley, used this language: <sup>1</sup>

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as federal corporations."<sup>2</sup>

"Assuming, then, that the Central Pacific Railroad Company has re-

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<sup>1</sup> *California v. Pacific R. R. Co.*, 127 U. S. 1-39.

<sup>2</sup> See *Pacific Railroad Removal Cases*, 115 U. S. 1, 14, 18.



ceived the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot."

But these transcontinental lines were exceptional; the great extension of railroad construction was through private enterprise acting under state incorporation; and it was not until flagrant examples of discrimination by the managers of railroad companies in favor of some classes of shippers over others had become so notorious and so burdensome as to provoke an outspoken national protest, that the Congress, in comprehensive form, asserted, in the exercise of the power to regulate commerce, the right to control the operations of interstate railroads by state corporations, and to declare unlawful, and through the creation of a Commission on interstate commerce to prevent, the discriminatory practices which had grown up. Absolutely essential to any trade or commerce is the highway over which must pass the subjects of trade and commerce. With rare exceptions the free use of the natural waterways has always been recognized. No discrimination in the use of highroads or turnpikes appears to have ever been practiced. But the conception of a railroad as a public highway open to the use of all alike, without discrimination, without favoritism, and upon fair and reasonable terms, was singularly late in developing. The attitude of most railroad managers was until a very recent date, and to some extent still is, that the railroad is a private enterprise to be controlled as its officers please, to be operated on such terms and at such rates as they think best, and to be free from any governmental interference.

Commerce is defined to be the "exchange between men of the products of nature or art; buying and selling together; trade; exchange of merchandise, especially as conducted on a large scale between different countries or districts, including the whole of the transactions, arrangements, etc., therein involved."<sup>1</sup>

Trade once meant literally a path. The idea of commerce then

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<sup>1</sup> Oxford Dictionary.

embraces, first, the exchange between men of the products of nature or art, and, secondly, the path or highway over which the merchants and their merchandise pass and repass in carrying on commercial intercourse. The Interstate Commerce Act sought to make the railways highways of commerce open to the use of all commerce on equal terms for reasonable rates and without unjust discrimination between the users. It did not attempt to reach water-bound commerce, except when used in connection with a railroad as part of a through route. No great abuse had arisen with respect to water carriage only. The rivers and the sea were free to all. No ship could have a monopoly of the right of navigation; no group of shippers could create a monopoly. The water highways were open to others on precisely the same terms as to them, for the great case of *Gibbons v. Ogden* had determined that no state could create a monopoly in the right of navigation in its waters. A railroad, however, preempted a pathway; existed by virtue of the authority of the people; derived its powers of location and operation from the states, and subverted and abused that authority when it served some of the people on terms which operated to the disadvantage of others similarly situated.

So the Interstate Commerce Act of 1887 declared that charges made for services in the transportation of persons or property among the states must be reasonable, and that no carrier should charge any greater compensation for the transportation of passengers or of like kind of property under substantially similar circumstances or conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance; made it unlawful for any common carrier subject to the act to give any unreasonable preference or advantage to any particular party or locality or species of traffic; required every carrier to afford reasonable and equal facilities for the exchange of traffic between their respective lines; prohibited pools and combinations between carriers; required the publication of rates and forbade the collection of any but the published rate, and provided for the appointment by the President, with the advice and consent of the Senate, of a Commission of five with powers to investigate and prosecute violations of the act.

The act marked a great departure. It met with determined opposition on the part of the railroad companies. The orders of the Commission were challenged in the courts, and the terms of the



act were very generally disregarded. In 1903 the Elkins Act was passed, making violations of the Interstate Commerce Act by corporation-carriers misdemeanors, and imposing heavy penalties therefor, and also making it a misdemeanor punishable with heavy fines to offer, grant, give, solicit, accept, or receive any rebate or discrimination in respect of the transportation of property in interstate or foreign commerce.

Despite these acts, the evidence of a persistence by the railroads in discriminatory practices was so overwhelming, that during the session of 1905-06 the Hepburn Bill, after a prolonged and exhaustive discussion, was passed by Congress. This act extended the scope of the Commerce Act by including within its provisions oil and pipe-line companies and express and sleeping-car companies. It regulated and restricted the granting of free transportation; provided more specifically for the printing and posting of schedules of rates, fares and charges; required terminal, storage and icing charges to be separately stated; provided that no change in rates or charges should be made except after thirty days notice to the Commission and the public; made officers and directors of corporations subject to the act liable to fine and imprisonment for violations of its provisions; authorized the Commission on complaint made to investigate any alleged violation of the act, and into the reasonableness of any rate, charge, or practice, and to make an order requiring the carrier to desist from such violation and to make no charge in excess of a maximum rate or charge to be fixed in the order; and, on like complaint, to establish through routes and maximum joint rates, provided no reasonable or satisfactory through route should then exist, and authorized the Commission to award damages to any party aggrieved by the unlawful act of a carrier subject to the act.

The Commission was enlarged to seven members, to serve seven years each, the terms of one of them to expire each year, and no more than four to be of one political party.

This act became effective August 28, 1906. It has now been in operation upwards of three years. While on the one hand it has failed to accomplish the work of destruction which was freely predicted of it by those who opposed its enactment, it has also failed to cure all the evils against which it was directed.

One of the fundamental objections urged to the present organization and functions of the Interstate Commerce Commission is that

it combines legislative, administrative, and *quasi*-judicial functions. The power of making rates for future application is a legislative function, which, it is well settled, cannot be devolved upon a court. The reasonableness of rates fixed by the Commission, that is, the question whether or not they are confiscatory and deprive the carrier of a reasonable return upon his investment, is a judicial question, which cannot be left to the Commission. These constitutional difficulties are at the source of much of the trouble which has been experienced in the effectiveness of supervision by the Interstate Commerce Commission; and experience has shown that in a large number, if not in the great majority of instances where orders have been made by the Commission of more than trivial importance, the carriers affected have brought suit and obtained injunction restraining the enforcement of the order until its reasonableness should be investigated by the courts. This system involves constant reversal by the courts of orders of the Commission, prolonged delays in the enforcement of orders, conflict of decision between the different courts, and much uncertainty in the law. Complaint has also been made that, while the Commission, under the present law, is empowered to review the reasonableness of a rate or a practice, and to fix a maximum beyond which the rate may not be enforced, it is without power to review classifications of commodities carried, — a subject of equal importance with the fixing of a maximum rate. Under the present act, too, a carrier may file a proposed increase in rates, which, at the expiration of thirty days after filing and publication becomes the lawful rate, and which may not be investigated or attacked until after it has become effective, and then only upon complaint filed. If such complaint be made, and investigation disclosing the fact that the rate is unreasonable, the Commission orders it to be reduced, the enforcement of the order may be enjoined by proceedings in court, and months and even years elapse before it takes effect, during all of which time, of course, the increased rate is collected.

To meet these objections certain suggestions have been made. For the purpose of preventing the conflict of decision and the delays and uncertainties in the enforcement of the law which now exist, it is proposed to create a special tribunal to be known as the Commerce Court, in which shall be exclusively vested all the jurisdiction now possessed by the Circuit and District Courts and the



Circuit Courts of Appeals of the United States with respect to the enforcement or review of orders and decrees of the Interstate Commerce Commission; and that all applications for injunctions to restrain orders of the Commission be heard by all the judges of this court, whose orders and decrees shall be final except that an appeal may be taken to the Supreme Court of the United States from final decrees in cases where a constitutional question is involved. For the purpose of removing the Commission from the position of prosecutor or litigant, it is proposed that all proceedings to enforce or defend orders of the Interstate Commerce Commission shall be conducted by the Department of Justice.

The further suggestions are that the Interstate Commerce Act be amended as follows:

1. By providing that the Commission be specifically empowered to review classifications, both as to items and grouping.

2. By providing that whenever a new rate or classification shall be filed, the Commission may at once, either upon its own initiative or upon complaint, institute an inquiry into the reasonableness or justice of such rate or classification, and in order to facilitate such inquiry may postpone for sixty days the effective date of the proposed new rate or classification.

3. By providing that the Commission may by order suspend, modify or annul any changes in rules or regulations which impose undue burdens on shippers.

4. By providing that the Commission may proceed either on its own motion or upon complaint filed with it, and that in proceedings on its own initiative, it may exercise like powers to those which it may exercise in proceedings based on complaints of third parties.

5. By specifically empowering the Commission, on the application of one carrier or of an individual, or at the instance of the Commission itself, to compel connecting carriers to unite in forming a through route and fix the rate and the apportionment thereof among the carriers.

6. By providing that it shall be lawful for carriers to unite in fixing a rate or rates, provided the same be filed and published; the question of the reasonableness and justice of such rate to be subject to the other provisions of the act in like manner as any other filed and published rate; the agreement, however, not to amount to a contract to maintain the rate for any given time, but each party to

have the right, independently of the other, at any time to withdraw from or alter such rate in conformity with the other provisions of the statute.

The purpose of this proviso is to protect the carriers from the penalties of making an agreement to restrain trade in violation of the Sherman Act.

7. By specifically empowering the Commission to prescribe rules and regulations under which shippers shall have the privilege of designating the route over which their shipments shall be carried to destination.

8. By providing that the agent of a railroad company shall be compelled, on written request, to state in writing the legal rate over the line of the carrier, including any joint rate to which such carrier is a party, and imposing a fine as a penalty for stating an erroneous rate in pursuance of such request.

9. By providing that after the passage of the amending act, no railroad company shall acquire stock in any competing railroad company.

10. By providing that after the passage of the amending act, no railroad company engaged in interstate commerce shall issue, for less than their par value, any additional stock or bonds or other obligations (other than notes maturing not more than twelve months from date of issue) except with the approval of the Commission, based upon a finding that the same are issued for a price not less than the reasonable market value for bonds, and if either stock or bonds be issued for property, then at the fair value thereof as determined or approved by the Commission.

These modifications in the act would, it is believed, make it a complete and effective measure for securing reasonableness of rates to all, and fairness of practices in the operation of interstate railroad lines, without undue preference to any individual or class over any other.

But transportation facilities only constitute the machinery by which commerce is carried on. All transportation is commerce, but all commerce is not transportation. Definitions as to what constitutes interstate commerce, said Mr. Justice Peckham in the case involving the validity of the agreements under which was conducted the business of the Kansas City Stockyards,<sup>1</sup> "are not easily given

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<sup>1</sup> *Hopkins v. United States*, 171 U. S. 578-597.



so that they shall clearly define the full meaning of the term. . . . We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted."

"Commerce among the states," said Mr. Justice Holmes in the Beef Trust Case,<sup>1</sup> "is not a technical legal conception, but a practical one, drawn from the course of business."

The right to engage in interstate commerce derives its source, as Chief Justice Marshall said in *Gibbons v. Ogden*,<sup>2</sup> "from those laws whose authority is acknowledged by civilized man throughout the world. . . . The Constitution found it an existing right and gave to Congress the power to regulate it."

With the tremendous commercial impetus that followed the Civil War, largely through the use of special and generally secret advantages in rates and facilities of transportation, the principal manufacturing and commercial industries of the country became concentrated in the hands of small groups of men, who by those means, with the aid of borrowed capital and with the machinery of intercorporate stock ownership, acquired a control of markets and a power of destroying all competition, which, it was perceived, could only be checked by national legislation.

Accordingly in the year 1890, in the exercise of the power to regulate interstate commerce, Congress passed the act known as the Sherman Anti-Trust Law. This act was approved by the President, July 2, 1890. It was fitly entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." It has been before the Supreme Court of the United States in upwards of a dozen notable cases. Its constitutionality was attacked, but upheld. Its scope, meaning, and effect have been minutely analyzed. Yet it may be confidently asserted that no law on the statute books is so generally misunderstood. Its provisions are so comprehensive and unqualified that a literal strained interpretation has become commonly accepted not only among laymen, but even among lawyers. Yet, in one of the first cases which arose under its provisions, the Supreme Court de-

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<sup>1</sup> *Swift & Co. v. United States*, 196 U. S. 375-398.

<sup>2</sup> 9 Wheat. 1-211.

clared that the act must receive a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely such bearing on interstate commerce as to bring it within its condemnation. The literal construction was pressed upon the Supreme Court as a reason for holding that the act was not a constitutional exercise of power by Congress, and it was urged, in one of the early cases, that if upheld, it would by its terms operate to prevent the formation of corporations to carry on any particular line of business by those already engaged therein, or contracts of partnership or employment between persons previously engaged in the same line of business and the like. But the court disclaimed any such intention on the part of Congress, saying that the formation of corporations for business or manufacturing purposes had never, to the knowledge of the court, been regarded as in the nature of a contract in restraint of trade or commerce, and that the same might be said of the contract of partnership. Of course, both corporate and copartnership organizations might be employed as machinery for imposing an unlawful restraint upon the otherwise free current of interstate trade, or for the purpose of creating a monopoly. Wherever such purpose is discovered or such result attained, the act is broad enough to furnish a remedy. The stream must not be dammed, the waters must not be impounded for the use of a favored few and to the exclusion of others.

Carefully and logically has that great court analyzed and applied the act in every case which has presented some phase of its meaning for judicial construction or application. An accurate analysis of all the decisions of that tribunal, it is believed, will demonstrate that, wherever the act has been held to apply, the evidence conclusively showed that the contract, combination, or conspiracy in question was entered into either (1) with a specific intention to restrain trade or create a monopoly, or (2) that it was of such character that its necessary effect was to directly restrain trade or create a monopoly. But the fact that despite the actual decisions by the Supreme Court in those controversies which have come before it, some judges still persist in giving to the statute a literal interpretation and claiming for it the extreme application which the justices of the Supreme Court have repelled and the court itself refused, coupled with the criminal liability imposed on all those affected by its prohibitions, would seem to justify, if not to demand, that the act should be so amended as to



clearly relieve it from any foundation for the unreasonable effect attributed to it, which goes so far beyond the mischief which the act was designed to remedy.

If amended at all, the terms of the act should discriminate between a declaration of the illegality of contracts and combinations in restraint of interstate commerce, and a more precise definition of the acts with respect to such contracts, combinations, and conspiracies which properly constitute criminal offenses. At common law, contracts in general restraint of trade were void in the sense of being non-enforceable in the courts. Parties to such contracts were left to their observance or neglect as they might see fit; the courts would take no cognizance of them. A similar rule might be declared with respect to contracts of that character in so far as they have to do with interstate commerce, unless they operate to control prices, exclude third parties from participating in interstate commerce, or tend to the creation of monopolies. When entered into with such intent, or under such circumstances as necessarily to imply such intent, then and only then should criminal liability clearly exist.

It has been said by the Supreme Court that the Sherman Act struck at combinations that unduly restrain because they monopolize the buying and selling of articles which are to go into interstate commerce. One of the definitions of the word "trust" contained in the Sherman Act at one stage of its passage through Congress was "a combination to create a monopoly." Undoubtedly the prime objection to contracts that stifle competition is that they tend to the establishment of a monopoly; and monopolies always interfere with general freedom of trade and commerce. If, therefore, criminality in connection with contracts, combinations, or conspiracies in restraint of trade be limited to those entered into with intent and purpose to control prices, or to prevent competitors in such trade from engaging or continuing therein, or for the purpose of creating a monopoly in interstate trade or commerce, full force and effect would seem to be given to the underlying purposes of the Sherman Act.

Much discussion has taken place over the question whether or not the Sherman Act included within its denunciation contracts which do not unreasonably restrain trade. Mr. Justice Peckham in the *Trans-Missouri* case,<sup>1</sup> and Mr. Justice Harlan in the *Northern Securities* case,<sup>2</sup> declared that the act is not limited to restraints of

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<sup>1</sup>166 U. S. 290.

<sup>2</sup> 193 U. S. 197.

interstate and international trade or commerce that are unreasonable in their nature, but that it embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce. On the other hand, Mr. Justice Brewer in the Northern Securities case objected to this doctrine as not being necessary to the decision of that case, or to any of the earlier decisions of the court, and affirmed that Congress did not intend to reach and destroy those minor contracts in partial restraint which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. This view of the law would seem to be sustained by the actual decisions of the court; and a provision inserted in the act specifically excepting from its provisions agreements in partial restraint of interstate or international trade or commerce which are not unreasonable, and which are valid by the rules of the common law, would only write into it that express meaning which the Supreme Court has ascribed to it.

The great purpose to be borne in mind in connection with this and similar legislation, is always the preservation of the freedom or liberty to trade. The great vice of monopolies and combinations in restraint of trade is that they interfere with the rights of others than the parties to them. If two competitors in business form a partnership and agree to conduct for their joint account a business which they have theretofore conducted in rivalry with each other, assuredly no public interest is injured. Unrestricted competition which becomes destructive is not beneficial either to those engaged in it, or to the state. But where two or more persons combine to prevent a third from engaging in trade or commerce, except upon terms and conditions prescribed by the combination, and take some action to carry out the purposes of such combination, then, on fundamental principles of the common law, an actionable injury arises; and where the injury affects a large enough body of the people, a public right of interference is created.

This is the basis of the legislation against combinations and monopolies. They impair that right which the English law has always esteemed of immeasurable value to the community, inhering in every man, to pursue trade and commerce as he will, without let or hindrance, except in so far as he may trench upon similar rights exercised by others.

I have spoken of the highways or pathways of commerce, and of the right of the citizen to carry on trade or commerce between the



states at will without interference; but modern business is rarely conducted on a large scale by individuals. The amount of capital required has compelled coöperation by many under arrangements limiting the liability of the associates which can only be secured by corporate organization. With singular disregard of the underlying principle which gave to the national government full power to regulate commerce between the states, the Supreme Court of the United States, when the question first arose, held that a corporation formed under the laws of one state could only transact business in another state with the leave of that state, and upon complying with any terms and conditions which it chose to impose. In the exercise of this conceded right, a veritable upas tree of conflicting legislation has grown up in the different states, making it wellnigh, if not absolutely impossible for any corporation formed under the laws of one state to do business in a considerable number of other states. When a stream is dammed at one point, the accumulated head of water seeks an outlet at some other point where there is less resistance. So, in avoiding the consequences of this legislation, there was invented the most potent instrument for the creation of vast combinations of capital, and far-reaching and comprehensive monopolies, ever devised by man; namely, the holding corporation. By this expedient, through the expenditure of a much smaller sum than would have been needed to acquire the direct ownership of properties, the control of comparatively small groups of men has been extended over numerous areas, until, unless checked by government, some of the principal industries of the country were in a fair way to become as completely monopolized as though by royal grant they had the exclusive right of sale: that most obnoxious form of monopoly against which the famous anti-monopoly of James I was particularly directed.

No doubt, the Sherman Act is sufficiently comprehensive to reach and destroy such monopolies as these, but at the same time that the national government forges a weapon to destroy such abuses it must provide a substitute for those legitimate enterprises which are equally dependent for their existence upon the system so abused. It must therefore provide a means of enabling coöperative enterprise to engage freely and openly in interstate and foreign commerce without the interferences by state action which fetter, confine, and destroy the possibility of such free pursuit. This can only be done by the enactment by Congress of a law providing for the formation of corpora-

tions to engage in trade and commerce among the states, protecting them from undue interference by the states, and regulating their activities so as to prevent the recurrence, under national auspices, of those abuses which have arisen under state control. Such a law should provide for the organization and management of trading corporations; for the issue of their stock, either without par value, and then to such amount as the promoters might think advantageous, or if issued with par value, then to an amount equal only to the cash paid in on the stock; or, if the stock be issued for property, then at a fair valuation ascertained with the approval of a department of the government having supervision of such corporations, after a full and complete disclosure of all the facts pertaining to the value of such property and the interest therein of those who are to turn it into the corporation in exchange for stock. It should protect the corporations organized under it from undue interference by state authorities, subjecting its real and personal property only to such taxation as is imposed by the state upon other similar property located therein; and it should require it to file full and complete reports of its operations with the Bureau of Corporations, or some other similar office, at regular intervals. Such corporations should be prohibited from acquiring or holding stock of other corporations. The power to regulate interstate commerce is believed to be broad enough to authorize such legislation. It has been upheld when directed to corporations carrying on other forms of interstate commerce, transportation, navigation, etc.

These agencies of commerce, thus created under national authority, should appeal to legitimate investors and to legitimate enterprise. They would not afford the same opportunity for stock watering and stock juggling as exists to-day under the complex and conflicting regulations of many states; but they would offer to honest, conservative management and to prudent investors a security which does not exist under the present system; and if availed of to a large extent, it might be found advisable by Congress at some future time to prohibit trading corporations, organized under state laws, from engaging in interstate commerce. This, however, should be considered only if the success of voluntary organization under national law should be so demonstrated as to make it clearly appear contrary to the general welfare that no other than national corporations should engage in interstate trade.

These suggestions involve no novel principles. They are merely



the application to meet the needs resulting from growth. "Commerce," said Mr. Justice Johnson, in the great case of *Gibbons v. Ogden*,<sup>1</sup> above referred to, "in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation." As regards commerce between the states and with foreign nations, they become the objects of federal regulation. Only the national government is possessed of powers adequate to the regulation of modern commerce: transportation, business, and the organization of capital to carry on interstate business. This power imposes a responsibility to exercise it as occasion demands, and when exercised, to make it adequate, comprehensive, and effective.

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<sup>1</sup> 9 Wheat. 1-229.

## WHAT LAW GOVERNS THE VALIDITY OF A CONTRACT.

### III. THEORETICAL AND PRACTICAL CRITICISMS OF THE AUTHORITIES.

FOR the purpose of criticism, the suggested rules can be divided into three classes. 1. Rules by which the intention of the parties is allowed to fix the law. There are, as has been seen, various rules belonging to this class. Most of them include a more or less conclusive presumption as to which of the several possible laws the parties intended. The differing presumptions, however, while quite inconsistent with each other do not affect the general nature of the rules. They all involve the assumption that the parties may in some way or other by their own will affect the law which applies to their contracts. 2. The rule that the place of performance governs the obligation of the contract. 3. The rule that the place of making the contract governs its obligation. Each of these rules will be taken up in turn and criticised both from a theoretical and from a practical standpoint.

#### I.

Let us first consider rules which in various forms and with different limitations allow the intention of the parties to govern the obligation of their contract. The fundamental objection to this in point of theory is that it involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract. The adoption of a rule to determine which of several systems of law shall govern a given transaction is in itself an act of the law. When, for instance, it is said that the law of the domicile of the deceased person governs the devolution of his personal property at his death, this means that the law of the place where the property is situated by an act of legislation adopts this domiciliary law as the law to govern the inheritance. We are apt, as a consequence of the very general adoption of this rule, to close our eyes to the fact that it is an act of the law of the place of *situs*;



but it is quite clear that the place of *situs* may adopt this law of the domicile or not, at its pleasure, for the devolution of property within its control, and therefore that if the law of the domicile is applied it is by reason of a legislative act of the *situs*.<sup>1</sup> So in the case of the adoption of a law to govern the nature and obligation of a contract, it is entirely possible from the point of view of any one state that the law of that state or of some other state should be applied to the determination of the question; but if the law of that state is not applied, it is a result of the sovereign will of the state which controls the contract. Now, if it is said that this is to be left to the will of the parties to determine, that gives to the parties what is in truth the power of legislation so far as their agreement is concerned. The meaning of the suggestion, in short, is that since the parties can adopt any foreign law at their pleasure to govern their act, that at their will they can free themselves from the power of the law which would otherwise apply to their acts.

So extraordinary a power in the hands of any two individuals is absolutely anomalous; so much so that even the courts which adopt a rule of this sort have been occupied in defining limitations to the exercise of the parties' will. Thus, it is almost universally provided that the parties cannot exercise this power unless they do so in good faith. Perhaps the earliest application of this idea was in the important case of *Andrews v. Pond*.<sup>2</sup> In that case the contract was invalid according to the law of the place of making and also according to the law of the place of performance. The court said that while ordinarily the parties might agree on either law at their option, to govern the validity of their contract, yet in this case, where there was no *bonâ fide* agreement to submit to either law, but both laws were violated by the parties, the ordinary rule by which the parties could choose their law would not apply. Following this case the courts accepted the statement that the parties' agreement upon a law must be *bonâ fide*; but this was afterwards carried further than the case where the parties agreed to abide by neither law. In many cases, for instance, where the parties absolutely accepted and followed out the law of the place of performance the courts have nevertheless held the agreement to adopt that law not to be a *bonâ fide* agreement, simply on the ground that their intention was to avoid the more stringent provisions of the law of the place of making. This form of the

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<sup>1</sup> *Cooper v. Beers*, 143 Ill. 25.

<sup>2</sup> 13 Pet. 65.

rule leaves it for the court to determine whether the parties did or did not act *bonâ fide* in adopting one law or the other, and it is sometimes difficult to anticipate what the court will decide. Thus, in two cases already cited,<sup>1</sup> where to the ordinary apprehension the facts were practically identical, the same court held differently as to the *bona fides* of the parties; and thus, as a result, applied different laws to what apparently were identical contracts.

Another limitation frequently enforced by the courts is a limitation upon the breadth of choice of the parties. It would obviously be impracticable to allow the parties even if they acted *bonâ fide* to select some strange foreign law to govern the obligation merely because it seemed to the parties that such a law was just or desirable. The courts have, therefore, generally confined the parties in their choice of law either to the law of the place of making or to the law of the place of performance. In one or two cases, to be sure, the courts have gone further and allowed the law of some third state to be adopted, as for instance the state of residence of a contracting party or the state of *situs* of the security.<sup>2</sup> In general, however, this extension is not permitted and the parties are confined rigidly to the law of the two places, that of making and that of performance.<sup>3</sup>

These limitations laid down by the courts evince a feeling of doubt as to the correctness or the feasibility of the unlimited rule. Theoretically, it would seem that if the rule can be justified it must be on some ground that would permit to its parties the unlimited choice in all cases, so that the parties could agree upon the law of China or of Central Africa if that was the law which really *bonâ fide* appealed to them as the one best fitted to apply to their agreement.

The theoretical objection to the rule as generally laid down appears to have presented itself forcibly to Professor Dicey, who has in his *Conflict of Laws* thrown the common doctrine into a form somewhat more capable of theoretical defense. He says in note 5 to his second edition of his *Conflict of Laws* (page 730) that the law as first stated and applied by the English courts was that everything connected with the contract is governed by the *lex loci contractus*, which they interpreted as meaning the law of the place where the

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<sup>1</sup> Jackson v. Am. M. Co., 88 Ga. 756; Odom v. New England M. S. Co., 91 Ga. 505.

<sup>2</sup> Scott v. Perlee, 39 Oh. St. 63.

<sup>3</sup> Central Trust Co. v. Burton, 74 Wis. 329.



contract was made. He adds that a change of doctrine was then combined with verbal adherence to the old formula, which was reinterpreted so as to mean the law of the country with a view to the law whereof a contract was made; which may be the law of the place of making, but may very likely be the law of the place of performance. He then assumes a "proper law of a contract, the law which governs the obligation of the contract," or, as he calls it, its essential validity, and which he defines to be "the law or laws by which the parties to a contract intended or may fairly be presumed to have intended the contract to be governed; or, in other words, the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves." He admits the possibility of the parties, whilst really contracting with reference to one law, yet asserting their intention to have the validity of their contract determined by another law which would make it valid, and this he says they cannot do. In other words, the intention of the parties is not strictly their intention to adopt what law they please to give the contract validity, but their intention to adopt as the seat of their obligation and the real place where it is to be in force some one state, whether the place of making or of performance. It is certainly not theoretically impossible to assign a contract to some one state as the seat of the obligation and to have it governed by the law of that state. Some such suggestion has already been made by the author as solving the difficult question of what law governs a trust of chattels created *inter vivos*.<sup>1</sup> This suggestion was made, however, not as to the creation of a trust, but as to its administration after it had been validly created. Before such a principle can come into force it is necessary to have a trust validly created. In the same way some such doctrine might well be accepted to govern the performance of a contract once validly created; but it is still necessary to get the obligation created, and until that is done the parties are hardly in a position to discuss the seat of its performance. The ingenious suggestion does not at all relieve us of the necessity of admitting, if we accept any rule giving effect to the intention of the parties, that we allow the parties by their own will to create an obligation, where, by the law of the place under which they act, no legal obligation would be attached to the agreement.

So far of the theoretical objections to this doctrine. The practical objections are quite as conclusive. This distinction between theo-

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<sup>1</sup> 20 HARV. L. REV. 395.

retical and practical objections is not one on which the author desires to insist. In the highest sense, an unjust rule or one that does not conform to type is an impracticable rule. If a doctrine is theoretically indefensible it is sure in the long run to lead to injustice and to inequality of operation. In that sense the whole previous argument is directed against the practicability of the rule in question. But in the immediate sense a rule which is theoretically indefensible may for a time at least work well in practice; and it is now desired to examine into the working in practice of the rule under consideration.

When considering whether a rule operates well in practice we are too apt to look at the question *a posteriori*. If, when the time comes for the court to determine the rule, it can say that in the case in which it is applied it does not work injustice or inconvenience, so far as the court can see, then it is a good practical rule and one that will commend itself to the good sense of the profession and of the public. It must be clear, however, that the practicability of a rule cannot be judged solely by a consideration of how well it will work in future cases. The direct object of the law is not to redress, but to prevent wrongs. Every actual litigation in which a rule of law is laid down represents a failure of the law to operate as it should have operated. The most practical use of a rule of law is to enable individuals to avoid a breach of the law, a dispute, and an expensive litigation. In short, the first test of the practicability of a rule of law is its certainty and the ease with which it can be stated to parties by counsel in advising them, in advance of action, upon the legality of their contemplated acts. In determining the rules for the validity of a contract it must be borne in mind that what the parties desire is to learn in advance whether their intended agreement would be a valid one, how it should be made, and what its effect would be. Parties contemplating a commercial dealing consult a lawyer a hundred times in advance of action for every time they consult him, after the contract is made and broken, to represent them in litigation. What business men need is a rule of law which a lawyer can give them when they consult him, and upon which they can act with ease and certainty.

In this sense the doctrine under consideration is absolutely impracticable. According to this doctrine it is the intention of the parties which determines the law to govern their obligation. But this intention is one which is found by the court from the facts of the case. In order to be sure that a certain law will finally be held to govern the obliga-



tion, counsel consulted in advance would need in the first place to be an expert prophet in order to know in what court the litigation would eventually take place, and in the second place a person familiar with the opinions then to be held by the members of that court on the question of the intention of the parties. For not only will the courts of two states differ as to the method of applying the rule; even the courts of the same state at different times will apply the law differently. Take, for instance, the question of the intention of the parties as to the law governing a shipment of goods by sea. The English courts and the federal courts in the United States were called upon simultaneously to decide the question of the intention of the parties as to the law which should govern a shipment of goods from the United States to England. In both cases the court laid most stress upon the language of the bill of lading, and this language was identical in both cases. Both cases went through several courts. As a final result the Supreme Court of the United States held that the parties intended to be governed by the law as laid down in the United States courts,<sup>1</sup> while the English Court of Appeal held that the parties intended to submit their contract to the law of England.<sup>2</sup> Counsel advising on the transaction here brought in question would be obliged, in order to inform clients as to the law which applied to the contract, to know whether the suit was eventually to be brought in a federal court in the United States or in the English courts. If he could venture to predict that the suit would be brought in England, he might with some confidence assert that for one reason or another, or for none at all, the court would find that the parties intended to be governed by the law of England. But suppose he could foresee that it was to be brought in the federal court of the United States. It would be impossible for him to guess what circumstance that court would rely upon in determining the intention of the parties. Would they presume that the law of the place of making was intended to govern, as was held in the case just cited? or the law of the place of performance, as was held in a later case?<sup>3</sup> Would considerable effect be given to a consideration of what law would make the obligation valid? or finally, would the court say (as it usually does in insurance cases) that the parties could not avoid the requirements of the law

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<sup>1</sup> *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 377.

<sup>2</sup> *In re Missouri S. S. Co.*, 42 Ch. D. 321.

<sup>3</sup> *Hall v. Cordell*, 142 U. S. 116.

of the place of making by an intention to adopt the law of another state? <sup>1</sup>

On a question of this sort counsel are dealing with a matter on which knowledge of the common law can throw no light and the precedents are practically valueless. As has been seen, the courts are inclined now to lay stress on one circumstance and now on another in finding the intention of the parties. The parties must, therefore, take the risk of what the court may find their intention to have been.

It may be said that counsel sufficiently familiar with the law might advise the parties to agree expressly upon the law of one state or the other as the law intended by them to apply to their agreement. Here, however, we are met by the difficulty that the courts will not necessarily enforce such an agreement or accept it as an expression of the real *bonâ fide* intention of the parties. In the first place, as was pointed out in considering Professor Dicey's view of the subject, the courts say in general that this is the mere expression of a wish that a certain law should be applied to their obligation, and not a complete submission of the contract to the state in question as the seat of its existence. In the second place, the courts may (and very probably would) refuse to apply the law agreed upon, on the ground that it was not the real *bonâ fide* desire of the parties to adopt that rule, but the agreement was merely the expression of a wish to escape from the burdens of the law of the place of making the contract. It is impossible to tell in advance whether the court in which the suit is brought will say, as several courts say, that no such agreement will be given any effect whatever; or whether it will say that there is in the case, notwithstanding the agreement, no *bonâ fide* adoption of that law; or whether, in the third place, the court will say that to allow the parties to agree upon this law would be allowing them to avoid the obligations of some other law, and for that reason their agreement will be given no effect.

In short, in cases of this sort, it is practically impossible to predict what any court in which this form of rule is laid down will say as to the intention of the parties, and it is therefore impossible for counsel to advise clients, in advance of action, how they can make a valid and binding agreement.

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<sup>1</sup> New York L. Ins. Co. v. Cravens, 177 U. S. 389.



## 2.

The second rule to be discussed is that which governs the nature and validity of a contract by the law of the place of performance. In theory the objection to this doctrine is, in brief, that it enables the parties to substitute for the law under which they act in making the contract another law, namely, the law of the place of performance. If the law of the place where the parties act refuses legal validity to their acts, it is impossible to see on what principle some other law may nevertheless give their acts validity. The law of the place of performance can have no effect as law in another place, namely, the place where the parties act; for it is a fundamental doctrine of our law that "the laws of every state affect and bind directly . . . all contracts made, and acts done within it. A state may therefore regulate . . . the validity of contracts and other acts done within it; the resulting rights and duties growing out of these contracts and acts."<sup>1</sup> Any attempt to make the law of the place of performance govern the act of contracting is an attempt to give to that law extraterritorial effect. It enables the parties to confer upon their acts a legal effect which the law under which the acts are done refuses to confer upon them.

An attempt is sometimes made to limit the generality of this rule by providing that the law of the place of performance will govern only where that place was *bonâ fide* chosen by the parties as the place where they desired performance, not merely as a place to which they turned in order to obtain the benefit of its laws. This modification of the rule, however, does not present us with a theoretically more defensible rule, while it involves uncertainty of operation and is therefore less practical. There are really four classes of problems which may arise in cases of this sort. (1) An agreement is valid where made, but the performance is forbidden where it is to be performed. In such a case if the performance is forbidden by law the contract certainly should not oblige the contractor to carry out his agreement where, even after the contract was made, performance was forbidden by the law of the place of performance, though in an English case, it was held that a suit would lie for non-performance.<sup>2</sup> The prevailing doctrine in such a case is that such an agreement, if its performance was forbidden at the time it was made, would never become

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<sup>1</sup> Story, Conf. Laws, § 18.

<sup>2</sup> *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589.

a binding obligation; the contract would be invalid even by the law of the place of making. (2) An agreement made in one state, where it is valid, to be performed in another state where the act of performance is not forbidden, but where the agreement if made there would not be legally binding. In such a case there is no theoretical reason why the contract should not be valid. In almost every jurisdiction in the world the agreement would be valid if the question were one merely of the form of entering into the agreement, and there seems to be no reasonable ground for distinguishing between the form required for validity and any other circumstance bearing on the validity. To hold in such a case that the law of the place of performance governs the validity of the contract is to enable one state to dictate to another what acts done in that other's borders shall and what shall not result in a legal obligation. In other words, it enables one state to extend its laws over to territories of another. (3) An agreement made in one state, where the act of agreeing is forbidden or has no legal validity, to do an act in another state where the agreement would be legally binding. Here, again, if the law of the state of performance is applied to the validity of the obligation, it enables an act to be done and to have legal validity in spite of the fact that the sovereign where it is done forbids it and refuses to give legality to it. (4) An agreement made in one state to do an act (forbidden in the state of agreement) in a second state where the doing of the act is not forbidden. In this case it would seem that since the performance of the contract only and not the making of it is forbidden in the state where it is made, there is nothing in the law of that state to make the contract itself invalid.

In all these cases the matter must, it seems, be determined theoretically by the law governing the transaction, *i.e.*, the law of the place where the parties act in making their agreement. If by that law their acts have no legal efficacy, then no other state can give them greater effect. If by the law of that state their acts created a binding obligation upon the parties, then the parties who have acted under that law must be bound by it.

When we come to consider the practical effect of the rule under consideration we find that it has one very great advantage over the rule previously considered. It is more certain in operation, and its application does not generally depend upon the interpretation to be placed by the court upon the meaning of the parties' acts. But while



this is true, there are nevertheless in many cases other circumstances interfering with the smooth operation of the rule. A contract must be made at a single moment once for all, and there can be but one act of contracting. The moment the parties are bound by a contract, that moment the obligation is forever fixed. The fact is, however, very different as to the performance. The performance of a single contract may call for a long-continued series of acts, performable in various places. The performance may begin in one state and finish in another, or there may be acts to be done in two different states in order to complete a performance. Where this is the case, as it often is, the rule that the validity of a contract is governed by the law of the place of performance is difficult of application. To meet this difficulty there are two alternatives. The first is in such a case to depart from the law of the place of performance altogether, and to apply to such a contract the law of the place of making only. This was the alternative adopted in the case of *Morgan v. New Orleans, Mobile, and Texas Railroad*,<sup>1</sup> where, in the case of a contract performable partly in New York and partly in Louisiana, Alabama, Mississippi, and Texas, Mr. Justice Bradley said, "In this embarrassment I do not know that I can do better than to fall back on the general rule that the contract is to be governed by the law where it is made." This forced application of a different rule in order to avoid embarrassment involves the abandonment of the principle of the rule that the contract is governed by the law of the place of performance. In other words, a mistaken theory found impracticable in operation yields to expediency.

The second alternative is to apply to the validity of the contract, when the question arises as to any one breach of it, the law of the place where that breach happened. In other words, the contract would be held valid as to some acts of performance, invalid as to others, according to the place where those acts were to be done. This alternative has been adopted in New Hampshire, for instance, in the case of contracts of carriage, with almost grotesque results. A shipment of goods perfectly valid where made would, according to this doctrine, put upon the carrier the strict liability of the common carrier while he was carrying the goods through certain states, while in other states it would enable him to claim that he was under no liability whatever.

A second practical objection to this rule arises from the difficulty

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<sup>1</sup> 2 Woods 244.

of getting expert legal advice at the time when the formation of the agreement is under consideration. If two parties are contemplating the formation of a contract and are seeking advice upon it, they must almost necessarily go to a lawyer in the place where the negotiations are being carried on. He can, in the nature of things, give expert advice only in the law of his own state. If the contract is to be governed not by that law, but by the law of the place of performance, it will be necessary for him to advise on a law in which he is not expert, and where he is required to make special study and is particularly liable to mistake. All that was said in the discussion of the rule first under consideration as to the practical need of obtaining advice before acting applies here. The difficulty is less, to be sure, because if this rule universally prevailed the lawyer consulted would have no doubt as to what law should be applied. But he would still be unable to give expert advice in that law; and the parties would therefore either be obliged to get along with the best advice they were able to obtain on the spot, or else they would be obliged to send into the state of performance for an opinion, with all the difficulty, expense, and delay which that necessity would entail.

## 3.

We come now to the third suggested rule, that the law of the place of making the agreement governs the nature and validity of the contract. That this rule is theoretically sound there can be no doubt. Even those judges and writers who finally lay down the different rule state this, first, as the natural one. The rule is based on the necessity of some law to raise an obligation between parties, and of this there can be no question. If two parties agree to do a thing, their agreement does not and cannot create any binding obligation to do it. The obligation created by the promise is merely a moral and social one, with which the law has nothing to do. It is only when the law affixes to the promise a legal obligation of performance that the parties can be said to have entered into a contract in a true sense. As the author has said, in another place, "in the legal sense, all rights must be created by some law."<sup>1</sup>

"The question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to per-

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<sup>1</sup> Summary of the Conflict of Laws, § 2.



form its terms, can on general principles be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law at that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it. If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so."<sup>1</sup>

So far is this the case that it is everywhere agreed that where a statute of the state where the parties contract applies to the contract, no other law, whether that of the place of performance or any other, can avoid the effect of the statute.<sup>2</sup> This doctrine gives full scope to the territoriality of law, and enables each sovereign to regulate acts of agreement done in his own territory.

Practically this is the best rule. It is open to none of the objections urged against the others. In the first place, there is no uncertainty in the application of the rule. There can only be one place in which a contract is made, and what that place is can never be subject to great or serious doubt. There is practically no difference of opinion as to where a contract is made among the authorities on any particular case. The act of contracting is a momentary act, and the contract must arise at some particular moment as a result of an act done in some one state.

The law of the place of making is furthermore the law which it is easiest for the parties to follow. An objection has been made to it on the ground that the place of making is merely accidental, that parties from different states may happen to meet in a third state and there form an agreement, and that when that happens there can be no presumption that these parties know the law of that state. The answer must be that the so-called presumption that the parties know the law is on the face of it false in fact, and is a mere way of saying that parties are bound by the law under which they act, whether they know it or not. Parties do not in fact, in most cases, know what the law is under which they act, yet they are justly held to be bound whether they know it or not, because if they do not choose to take the risk of what it may be, they may consult counsel learned in

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<sup>1</sup> Summary of the Conflict of Laws, § 90.

<sup>2</sup> *Fowler v. Equitable Trust Co.*, 141 U. S. 384; *New York L. Ins. Co. v. Craven*, 177 U. S. 389.

the law and find out what it is. In other words, parties embarking on an important enterprise should consult counsel and be advised as to the legal nature of what they are about to do. Now if the parties happen to meet in a certain state and there enter into a treaty for a contract, and their business is so important that they wish to be sure that they are proceeding in accordance with the law, they will be almost certain to consult counsel. Neither party is likely to go back to his own state and there take advice. While, therefore, a party cannot be presumed to know the law of that place, he can very properly be called upon to consult counsel there. In the practical sense, the law which it is easiest for parties to act under is the law of the place where they act; and it follows that the rule which is habitually applied to the validity of their acts is the rule which is based on the most practical considerations.

It thus appears that the principle which is both sound theoretically and most practical in operation is the principle that contracts are in every case governed as to their nature and validity by the law of the place where they are made.

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## GERMAN CONSTITUTIONAL LAW IN ITS RELATION TO THE AMERICAN CONSTITUTION.

IN studying the excellent book of the new President of Harvard University on the government of England, the reader will have a great impression of the almost inextricable complexity of the modern state. Most people, even while taking part in public life, scarcely become aware of the true internal life of this immense body, as members of which we are daily working. It is such a fact as we may observe in regarding a physical organism.

Every man has a superficial knowledge of his own corporal structure. He knows not only that he wants his feet for walking and his hands for grasping, but he has also an idea more or less clear of his invisible organs for breathing and digesting, of his nerves as instruments for accepting impressions and giving out movements, of his brain as an indispensable machine for thinking. But to have an exact science of the astonishingly complicated structure from infinitely small elements, by which nature makes possible this work of individual life, he must study many years with books and with the microscope. He will make use of his organs accurately and perfectly, yet he may or he may not know anything about all this. But if there occurs a disturbance in the working of his organs, he goes to the physician, and will trust most to the man whose science of the occult mysteries of organic life is the deepest.

The social bodies, and mainly the state which overwhelms them all, are indeed complicated to a higher degree than is the physical organism. They are the most admirable work of mankind. History formed them in the course of centuries. Partly by reflecting will, but in greater part by unconscious working, many generations have produced the invisible buildings we dwell in. Everybody knows by instruction the outlines of the state, and by experience forms nearer acquaintance with those parts of the edifice he inhabits or passes through. But nobody can perceive the whole nor conceive the structure of every part and the connection between the one and the other.

Even if he could do so, he would have only a conception of the mere mechanism by which social life operates. But the state is no dead mechanism which receives its movement by a force coming from outside. It is a living being, an organism, whose life rises from its own powers and is directed by its own soul. Each member of the nation, be he official or ordinary citizen, has to do with this life and is one of the working components of its unity. But in practical life he will gain but a vague impression of the immanent vitality and powerful unity itself. It is the difficult task of political and legal science to seek the true sources of common life and activity, by penetrating the whole, by analyzing the complicated detail, and by revealing the general rules, the thoughts and principles manifested in the single phenomenon. The genuine object of scientific treatment is here as everywhere the discovering of truth. But theory will also do a useful work for practice, if it promotes the understanding of the organic nature of human societies and awakens the conscience of the profitable and harmful effects of individual activities in the complex life of the whole.

There is, besides this complexity in structure, another analogy between social and physical bodies, which strikes the mind of the attentive observer. It is the manifoldness of varieties, developed in history. Surely we find not only the same elements, but also certain general forms of structure, in all kinds of human societies, as in all kinds of animals or plants. But the differences between them are nevertheless perhaps greater than between a bird or a fish, or between an oak and a rose. This will be found true not only in comparing the great organism of state or church with any private corporation, union, or association, but also in contemplating the mighty commonwealths of the modern world for themselves.

It will not be astonishing if we remark sharp contrasts in the organization and internal life of empires whose inhabitants belong to different races, as Russia and France, or China and Spain. There is naturally much greater similarity between the states of European type. All had the same origin. Their foundations were set up in the Frankish period; their development in medieval times depended upon the principles of the feudal system and was influenced by the ideas of the universal Roman Empire and the universal Roman Church; their transmutation into modern forms was achieved not without help from the renaissance of political thoughts of Greek



and Roman antiquity. Thus to-day they must also of necessity be characterized by many identical features. Yet how fundamental is the difference between the public institutions and, widely more, the public life of the nations of Teutonic and of Latin origin! The states, formed exclusively or mainly by Teutonic people, have surely retained much of the original common standard and spirit. But nevertheless the contrasts between them are very much stronger than, on the other side, the contrasts between the single realms of the Latin type.

To the Teutonic states belong three great world powers: England, the United States, and the German Empire. There are still other formations of the same origin, which have for us in the point of historical differentiation a keen interest, — Netherlands, the three Scandinavian kingdoms, the Republic of Switzerland, which, though including some Latin cantons, is essentially a German product, Austria, the German origin of whose constitutional law cannot be contested. What a wealth of variety is suggested to our minds by the mere pronunciation of these names! But let us confine our short survey to the three first-mentioned commonwealths.

England and the United States have, no doubt, a strict similarity, as should be the case between mother and daughter. Thus the structure of their public life exhibits from many standpoints a uniform aspect, which is wholly opposite to the aspect presented by all peoples of the European continent. Perhaps the strongest bond which holds together old and new England is the common law, and with it the conception of law at all, whereon is based the whole community. For one like the writer, a teacher of law, the fundamental difference between Continental and English legal systems forms the widest gap between my own country and America. The fact that, while the peoples of the European continent, with few exceptions, — for example a part of Switzerland, — altered their native law by the reception of the written Roman law, the English world continued to conserve and build up its ancient home-law, distinguishes sharply the theoretical and practical character of public life on both sides. Nevertheless, even in this point the difference between Germany and America is less weighty than that between Germany and England, or between America and France. On the one side the German law was never wholly overrun by the Roman Code, and has in the last century experienced a powerful resurrection in private and still more

in public matters. In our universities there are separate chairs for teaching Roman and German law. On the other side the American development is nearer to the continental evolution than the English development has hitherto been. In America the law of nature has had a greater influence upon the formation of the existing institutions, and the aversion against codification of law has been less strong.

As a consequence, in America, as in Germany and the other countries of the continent, constitutional law is based upon fundamental statutes, while in England the constitution is not contained in any one single document. Surely also in America, as in Germany, custom and convention supplement the paragraphs of the written constitution and produce in time many changes unforeseen by its framers. Note the mighty influence of parties on government, yet no constitution says a word about party. But the written constitution stands on a higher plane and is for each citizen of America a thing almost holy. Also in Germany the written constitutions are guaranteed by promissory oaths of the sovereign, the officials, and the deputies. In America the constitution is inviolable by the legislature, and can be altered only by a very extraordinary procedure which is not often set in motion. In Germany constitutional amendments are more easily and more frequently made. Yet in Germany also there is prescribed a particular form of procedure for all such amendments. We have not different organs for constitutional law making, but a larger majority of the legislature, or at least, as in Prussia, a longer period of deliberation, is required.

The greatest resemblance between German and American public institutions is to be found, no doubt, in the fact that in both countries there exists a federal organization of the state power. While in England the whole sovereignty is concentrated in a King and Parliament, and the divisions of the country are only communities with delegated power, in Germany, as in America, there is a double system of state life. The German Empire — unlike the former German confederation dissolved in 1866 by war and violence — is a true state, to which every German is immediately subject. But the single kingdoms and smaller monarchies and the three free cities, which compose the empire as its members, are also true states. They existed before they were united into a federal state and have not given up all their original power. Each has its own constitution,



fixed by its own people and completely intangible by the empire. In case of a conflict between the government and the representative bodies each part may, if a special court for the decision of such questions is not provided, bring the question before the organs of the empire.

The constitutions of the single German states are much more different the one from the other than are those of the American states.

There are three republics, the free "Hansastädte," Lubeck, Bremen, and Hamburg, whose sovereignty is exercised by a great council immediately elected by the citizens, the "Bürgerschaft," and a narrower council elected by this "Bürgerschaft," the "Senate," whose head is the yearly changing "Bürgermeister." Both assemblies together possess the legislative power, while the executive power is lodged in the "Bürgermeister" and "Senate," controlled by the representative assembly.

All the other states, to the number of twenty-two, are hereditary monarchies. In twenty of them the monarchical power is limited by a modern representative organ, that is to say, a "Volksvertretung," or a parliament. In the greater states this is divided into two separate houses after the pattern of the English House of Lords and House of Commons. In Prussia there is a "Herrenhaus" and a "Haus der Abgeordneten"; in Bavaria, a "Kammer der Reichsräte" and a "Kammer der Abgeordneten"; in Saxony, Würtemberg, Baden, and Hessen, a first and a second chamber. The upper house is a more or less aristocratic element of the representative organ of the people; the members are appointed or elected in very different ways, partly by nomination of the Crown, partly by election of Town-Councils, Universities, other corporations or electorates, partly by the union of a seat with an hereditary or personal dignity. The second chamber in all these states is elected by the whole people and forms a democratic element. But there are strangely different systems of election. In Prussia the right of voting belongs to every citizen; but the voters of every district, called the "Urwähler," are divided into three classes according to the size of their taxes, each class paying one-third of the taxes levied in the electoral district. Each class chooses the same number of electors, called "Wahlmänner," and the electors meet in one assembly for choosing the two or three deputies of the "Wahlkreis." Thus the election is indi-

rect, and is performed, not by ballot, but by open declaration. In Saxony there has been introduced within the last year a system of universal suffrage, modified by the system of plurality of votes; that is to say, individuals may have more than one vote each, the number of votes depending upon landownership, higher education, and the payment of taxes above a certain amount. The southern states of Germany have in recent years conceded the right of universal, equal, direct, and secret voting. In all these constitutional monarchies the Prince is the representative of the sovereignty. But the legislative power cannot be exercised by him without the consent of both houses. The executive power lies in his hands, but he is forced to perform every act of government with the assistance and the written assent of a minister, who is charged with personal responsibility for it. The whole administration, and especially the income and expenditure of the public treasure, are under the control of the chambers.

In most of the smaller states the constitution is built upon these same principles, except that there exists only a single chamber, some of whose members must be appointed in a manner other than that of general election. But there are two states without any modern constitution: the two Grand-Duchies of Mecklenburg. Here the monarchical power is limited by a corporation of the ancient "Landstände," which are composed of the proprietors of the great landed estates, "Ritterschaft," and the magistrates of the greater towns, "Landschaft," all holding their seats in their own right. Furthermore, the ancient and peculiar character of these two states is illustrated by the fact that both of them, each having its own sovereign, preserve an old "landständische Union"; that is to say, they have in common only one popular council.

All these single states have full power in the matter of changing their constitution. They have also full power in the matter of their territorial basis. They may alter their boundaries by treaties with the neighboring states. The Empire can make no changes in their territory, except in the case of making peace after an unlucky war. But if the alteration of the boundaries would also alter the boundaries of the Empire, there is necessary a double act of legislation by the state and by the Empire.

Unlike the American commonwealths, the states have also retained the position of international persons. They are, it is true, deprived of the right to make war and peace. But they can make interna-



tional contracts, not only with another member of the Empire, but also with foreign states. They can also send and receive diplomatic agents to and from foreign powers, while the right of sending and receiving consuls is wholly reserved to the Empire.

In all matters not covered by the imperial power they have, like the American commonwealths, an independent legislative, executive, and judicial power. But in a wide field — wider than in the American Union — the states are strictly bound by the legislation and the control of the Empire. In these things they have only, as one may say, the position of bodies for self-government. In the matters with which the Empire does not deal they exercise full sovereignty. Examples of such matters are the organization and control of the smaller communities, villages, towns, districts, provinces; many matters of police; railways and public roads; agriculture and agrarian affairs; mines; waters; hunting and fishing; the whole work of education, elementary schools, secondary instruction, high schools, universities, academies of science and of art; also all matters of church. It is an important field, wherein each state may exercise its own legislative, administrative, and judicial power without any intervention from a higher authority.

Besides the states, the German Empire includes other members of different character.

There is the Reichsland, Alsace-Lorraine. This is not a state, because the governmental power does not reside in the Reichsland itself, but in the Empire. The rights, elsewhere belonging to the particular sovereign, are in the Reichsland exercised by the organs of the Empire, and are partly delegated to an imperial "Stadthalter," residing at Strassburg, who, like a monarch, is obliged to govern by responsible ministers. But though it is not a state, the territory is endowed with self-government, which in the course of time has increased more and more. It possesses a representative body, the "Landesausschuss," whose consent is indispensable for every act of territorial legislation, and by which the budget of the territory is fixed and controlled. The Reichsland has been compared with the American territories. Indeed, there is much resemblance. Also, as in the case of most territories, the Reichsland is ambitious to become a state. But the difficulties in achieving this end are almost insurmountable. To become a state, the Reichsland must either be endowed with a new dynasty or be elevated to a republican common-

wealth. Now the one of these alternatives is excluded by the jealousy of the existing dynasties, and the other by the prevalence of monarchical tendencies in Germany.

The Empire possesses, further, a number of colonies. But the very interesting study of the organization and the government of these colonies in comparison with the English, and now also the American colonial, system must be omitted in this short article.

The Empire itself is the great superior state, built upon and above all these subordinate commonwealths. The Empire has an organization without pattern in any other country. But the general nature of the federal state produces some analogies with the structure of the United States.

The immediate organs of the German Empire are the "Kaiser," the "Bundesrat," and the "Reichstag," to which may be added the "Reichsgericht."

The head of the Empire is the Kaiser. But the Kaiser, as Kaiser, is no monarch. He has, no doubt, the personal prerogatives of a monarch, enjoys the honors of a crowned head, and is not responsible for his acts before any court. But he is the equal, not the superior, of the other German princes, the first among peers. He exercises the rights of a sovereign, not only in his own name, but in the name of the United Princes and Free Cities, as the collective sovereign of the Empire. And he is far from possessing full monarchical authority. His part in legislation is limited to the promulgation and publication of the bills agreed upon by the Bundesrat and Reichstag. He has not the limited veto of the President of the United States; he has no veto at all. He is the chief of the military and naval forces of the Empire. But the army is not, as is the navy, a strictly united body. It is composed of contingents from the single states. Of these contingents the Bavarian is a separate army, which only in case of war stands immediately under the command of the Kaiser, while in peace the King of Bavaria is its highest commander. Also the Kings of Saxony and of Württemberg enjoy most of the rights of command over their contingents. The other chiefs of contingents have by several conventions, provided for in the constitution of the Empire, ceded almost all their rights, not to the Kaiser as Kaiser, but to the King of Prussia. The administration of naval affairs is a matter that belongs to the Empire and is directed by the Kaiser and his admiralty. But as to the army the military administration belongs

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to the states, and is performed by the four ministers of war in Prussia, Bavaria, Saxony, and Württemberg.

The Kaiser represents the Empire as against the foreign states. He sends and receives the diplomatic agents and the consuls, he ratifies the international treaties of the Empire, he has the rights of declaring war and of making peace. But if the treaties concern a subject of imperial legislation, for example trade, navigation, or private law, he is obliged to obtain the consent of the Bundesrat and Reichstag. And to declare war he needs the assent of the Bundesrat, except in the case of a hostile invasion of the territory of the Empire.

As to the civil administration, the Kaiser is charged with the execution of imperial acts passed by the Bundesrat and Reichstag and of the resolutions of the Bundesrat, and with overseeing the administration in the states in so far as the execution is intrusted to the states. But, unlike the President of the United States, he is not his own minister and he is not responsible in his own person. He has to appoint a responsible minister, whose written assent is required for the validity of every measure of imperial government, matters of military command excepted. This minister is the Chancellor of the Empire, the "Reichskanzler."

The Reichskanzler has a most important legal position, much higher than that of the Prime Minister in constitutional monarchies. There exist, it is true, many high offices of the empire, called "Reichsämter," to which are intrusted particular branches of the administration. There are Reichsämter for foreign affairs, for the navy, for internal government, for justice, for post and telegraph, for the treasury, for the colonies, etc. But the chiefs of those offices, called Secretaries of State, are only *quasi*-ministers. They are all subordinate to the Reichskanzler. They have a responsibility of their own, but their responsibility is limited by the nature of their department, while the Reichskanzler remains responsible for the whole. The Kaiser has further the right to summon the Bundesrat, and to summon, prorogue, close, or dissolve the Reichstag. But also in these functions his power is limited by strict constitutional rules. The right of dissolving the Reichstag he can only exercise with the consent of the Bundesrat, and a new Reichstag must be elected within a period of sixty and convened within a period of ninety days.

Thus the executive power of the Kaiser is far from being that of

a plenipotentiary. It is, however, more complete in the Reichsland and in the colonies, because here the exercising of the whole governmental power within the limits set by law is vested in the Emperor acting with the Reichskanzler.

The legal attributes of the German Emperor are much narrower than are those of the American President. The President is for four years invested with the almost absolutely arbitrary direction of the executive power. He is together head of the Union, whose majority he represents in the relations to other nations and to the single states, chief of the navy and of the army, and, if I may say so, Reichskanzler or Prime Minister. The cabinet he forms is only the instrument of his will. Nevertheless the position of the German Kaiser is not only higher in rank, but gives him also a greater influence on politics. But that is the effect, not of the constitutional functions attributed to the Kaiser as Kaiser, but of the legal union of the imperial Crown with the Crown of Prussia.

If the Emperor were elected, as the Emperor of the former holy German-Roman Empire used to be elected, and the votes should be given perhaps for a prince of Reuss or Lippe, his position would be intolerably weak. Now the constitutional law, by which the imperial dignity is inseparably annexed to the Prussian kingdom, alters the situation completely. The Emperor is not only head of the Empire for life, but the crown is inherited by his descendants. Every Emperor is the born representative of the united nation. Every Emperor is also the born sovereign of that one of the German states which is not only incomparably the greatest, but is endowed with a legal hegemony and is to be called the "Empire State," in a much more strict sense than is the State of New York. The Kaiser may thus confer the office of Reichskanzler and that of Prime Minister of Prussia on the same person, as he always has done, except during a short period of a few months. And as Prussian king he is also the president and the mightiest member of the second great organ of the Empire, the "Bundesrat."

The Bundesrat is the most peculiar organ of the Empire. We cannot compare it with any political body in any other country. To be sure, it takes the place which in the United States belongs to the Senate. Like the Senate, the Bundesrat is composed of the single states, and its functions are partly those of an upper house. But its structure is far from being that of a parliamentary chamber. The



members of the Bundesrat are not elected deputies, but plenipotentiaries of the single states. They may not vote according to their own conviction, but are charged with the duty of the votes of the states themselves. Thus they are appointed by the sovereigns of the separate states, and receive from them their instruction how to vote. Their "Yes" or "No," once given, is incontestable. But they are responsible to those who gave them their authority. By whom and how they are to be instructed is a matter of constitutional law in every single state. But for the Empire there exists only the fact that the mandatary is authorized by an act of the legal sovereign of his home state, and his legitimization is examined and approved by the Bundesrat itself. Thus the Bundesrat is in an eminent sense a federal organ of the Empire. It is the instrument by which the particular states, as organized bodies, arouse their membership of the general body to activity and gather their separate wills into a common will of the whole.

In accord with this the Bundesrat is invested with a large authority. One may say that it has to exercise all the rights of the collective sovereign of the Empire, as far as they are not transferred to the Kaiser. The Bundesrat participates, like the American Senate, in every legislative act. Every imperial bill, every "*Reichsgesetz*," requires uniform resolutions of the Bundesrat and the Reichstag. But the Bundesrat is at the same time invested with the highest executive power in all imperial matters. It is a supreme council of government. Its resolutions furnish the rules for the administration of government by Kaiser and Reichskanzler and the higher and lower officers of the Empire. The constitution provides for nine standing committees of the Bundesrat (*Bundesratausschüsse*), which are charged with the preparation and carrying out of its resolutions in the various departments of the government.

The Bundesrat decides by majority of votes. But the number of votes assigned to the single states is not equal. The number is fixed from an historical point of view, in conformity with the number of votes in the former Bundestag of the German confederation. Were it measured by the amount of population, Prussia would have a majority for herself alone, because she comprises almost two-thirds of the whole German people. Thus this institution, in spite of its name "*Bundesrat*," would be a mere sham. Now Prussia has only seventeen votes out of fifty-three, while Bavaria has six, Saxony and

Württemberg four each, some states three each, some others two, and the smaller states one each. Prussia may thus be overwhelmed by a majority. But this is not possible in military matters and in most matters of taxation, as regards which no alteration of the law can take place against the vote of Prussia. Further, no amendment of the constitution can be made if a minority of fourteen votes is opposed to it. Thus Prussia by herself has a veto upon every alteration of the constitutional law. But the same veto is conceded to any group of smaller states, if they have together fourteen votes, in particular to the three other kingdoms, whose votes reach together exactly the number of fourteen. Finally, the consent of each state is required when her special rights, guaranteed by the constitution, would be affected by a resolution.

The third great organ of the Empire is the Reichstag. Its formation corresponds with the formation of the House of Representatives in the United States. The deputies are chosen by universal, equal, direct, and secret election. Every German above twenty-five years of age has the right to vote, saving the exceptions usual in all countries, — disabilities resulting from crime, insanity, receipt of poor relief, etc. Every German means every male German. Woman suffrage has in Germany fewer chances for success than elsewhere, because we regard the voting right as an equivalent for military duty, which in Germany binds every citizen and does not affect women.

The Reichstag has all the functions of a representative body in a constitutional monarchy. It takes part in the legislature and controls the whole administration. It is, like the Kaiser, a strongly national organ of the Empire, for which the division of the nation into states is immaterial. The Reichstag is a "*Volksvertretung*" of modern character throughout.

The Empire possesses, too, an organ for judicial power in the Court of Empire, the "*Reichsgericht*," residing at Leipzig. This high court gives its judgments in the name of the Empire. It has final jurisdiction in questions of criminal and civil law. But its authority does not extend to constitutional questions as such. In this respect there is a great difference between German and American institutions. In the opinion of the writer it is a fundamental deficiency of our public law that there exists no protection of constitutional principles by an independent court of justice. It is no sufficient substitute that the Bundesrat is charged with a sort of international or



interstate jurisdiction as between the various states, and the Bundesrat and the Reichstag with authority to interfere in constitutional conflicts in a single state. In Europe the conviction of the omnipotence of the legislature prevails, so that the judges are obliged to obey every legislative measure enacted in legal form. Thus as against a "Reichsgesetz" no appeal to any court can bring help in the case of violation of constitutional rights. The courts dare not apply the statutes of the single states if they run counter to a Reichsgesetz. For "Reichsrecht" breaks "Landesrecht." But if that be not the case, the state legislature is also omnipotent, and its measures cannot be invalidated by a court. Only against measures of the administrative organs, however, the rights of individuals and communities in matters of public law are protected by judgment. But instead of the ordinary courts, special courts for administrative law, called "Verwaltungsgerichte," deal with such questions. Such courts exist in almost all German states. The Empire lacks a general court of this character, but it possesses some courts with judicial functions in regard to certain kinds of administrative questions. For example, a "Bundesamt für das Heimatwesen" for decision of questions of settlement for the support of the poor; the Patent Office (Reichspatentamt) for inventions, the "Reichsversicherungssamt" for adjudication of questions of the legal insurance of laborers, etc.

Thus the German Empire is a great commonwealth with her own powerful organs. It rules immediately all German citizens, so far as the sovereignty is not reserved to the single states, and it controls the states, so far as they are subject to the central power. That is wholly the same as in the United States. But in Germany the central power is much greater than in America. The principal difference lies in the much larger authority of the central legislative power. In Germany not only the regulation of trade, manufacture, labor, navigation, busses, banks, insurance, copyright, and almost the whole of economic life is an imperial matter, but the Empire is also empowered to legislate upon all questions of civil law, criminal law, and law of procedure. Indeed the Empire has framed a code of criminal law, a code of criminal and a code of civil procedure, a code of commercial law, and since the year 1900 a code of private law, by which uniformity of law in the whole country is substantially effected, and only a narrow field is reserved for state legislation in

these matters. The legislature of the Empire has also regulated the conditions of acquiring and losing citizenship in a single state, with which is immediately joined the citizenship of the Empire. Thus it is largely a difference of form, that, while in America the citizenship of the state depends upon that of the Union, in Germany the "Reichsangehörigkeit" is the consequence of the "Staatsangehörigkeit." Furthermore, statutes of the Empire regulate all military duties, rights, and substitutions.

The Empire is exclusively entitled to impose customs on imported and exported goods, and taxes on tobacco, sugar, salt, brandy, and beer, and has besides, concurrently with the states, the right of levying taxes upon income, property both real and personal, and inheritance. Hitherto the Empire has not introduced direct taxation in its strict sense, so that the taxes upon income, wealth, and industrial occupations are reserved to the states, and that upon real estate to the local communities. But the Empire has already established many taxes which are nearly direct in nature, mainly stamp taxes and a tax upon inheritance. Within the past year Germany experienced a great struggle relating to the reform of the finances of the Empire, which ended in rejecting the proposal to levy an inheritance tax even upon properties devolving upon husband or wife and children. So far as the income of the Empire from taxes and the profits of governmental departments are not sufficient for the expenditures, the deficit is covered by contributions of the single states, called "Matrikularbeiträge."

The legislative power of the Empire extends, as already remarked, much farther than its executive and judicial power. The direct imperial administration as such is limited to certain departments, such as foreign affairs, navy, post, and telegraph, the bank of the empire, etc. But the administrative offices of the states must, in all departments which are subject to the legislation of the Empire, act in accordance with the imperial statutes and the regulative orders given by the Bundesrat, the Kaiser, the Reichskanzler, or a specially authorized Reichsamt. Thus in raising customs and taxes for the Empire, in military administration, in coining, in sanitary measures, in overseeing busses, manufactures, etc. Except in cases of high treason against Emperor or Empire, the judicial power of the Empire is appellate only, that is to say, so far as an appeal to the imperial court at Leipzig is permitted at all. But all courts of the states have



to observe the form of procedure prescribed by the Empire and to apply the law enacted by imperial legislation.

There is to be mentioned a peculiarity of the German constitution unknown to the American federation. This peculiarity is seen in the reservation of rights by certain states, mainly by Bavaria, and in lesser degree by Württemberg and Baden. We have already spoken about the independence of the Bavarian army. Bavaria and Württemberg have their own posts and telegraphs. The three states mentioned enjoy exemption from the taxes laid upon beer by the Empire, and levy these taxes for their own public treasury. This is a keenly important privilege for Bavaria. Bavaria is also exempt from the poor law of the Empire. There are some other privileges, too numerous to be enumerated here. All these exemptions and prerogatives are jealously upheld and guarded by the states that possess them. It is manifest that those special state rights must have an influence also upon the budget of the Empire, and make necessary a very complicated annual financial reckoning.

Throughout the brief history of the German Empire there may be observed a permanent growth of the central power and a steady progress toward unification of the law. As we say in Germany, "the tendencies toward unification prevail over the tendencies toward federalism." Nevertheless, there is no doubt that the decentralizing forces are yet strong enough to maintain the equilibrium in the future, so far as we can foresee.

The writer has tried to draw a sketch of the German constitutional law. But the constitution is only the framework of the public life. There is much that might be said about the practical working of the constitution. This, however, cannot here be attempted.

Germany and America differ from England and many other countries in not having a parliamentary government. In Germany neither the Reichstag nor the popular assemblies of the single states rule by a cabinet representing their majority. To be sure the legislative houses are important factors in public life, which could not go on without their legislative and controlling functions. But neither the Emperor nor the sovereigns of the states are obliged by law or by convention to choose their counsellors from the majority in Parliament. The responsibility of the Reichskanzler is only a political one. It is the same with the ministers of Prussia, and really, too, with the ministers of the smaller states, though in many of these an impeach-

ment of ministers for misdemeanor is provided for by constitutional law. In truth, the cabinet is nowhere able to govern without gaining and holding a parliamentary majority. If not possessing a majority, it is at length compelled to resign or to dissolve. But while the cabinet retains office, it is independent of parliament and parliamentary parties.

In America, too, the government is not a parliamentary one. The President of the United States is not the trustee of Congress nor of one of the houses. He is the immediate trustee of the sovereign nation. It is the same with the governors of the single states. They are chosen by the will of the people, and, once in office, may remain there, although the majority of the representative body belongs to the opposite party.

In spite of the fact that parliamentary government is unknown in both countries, a marked difference between American and the German public life is produced by the unequal influence of parties in the two countries.

In America, that person who is for a few years the head of the state is in a certain sense elected by a political party. For it is really the convention of a party which chooses the candidates who have any chance of election. And the electors, if they use their votes effectively, must cast their ballots for one or the other of the party candidates. Such party government is possible, because here, as in England, there exist only two great historic parties, strongly organized and continually struggling for victory, — the smaller parties lately formed not yet having sufficient importance effectively to influence the result. Thus the government is, no doubt, a party government. The head of the state is bound to a party. The leading officials and many of the subordinates are taken from the ruling party and removed in case of change.

In Germany the Reichskanzler and the ministers are appointed by the hereditary heads of the Empire and of the states. It is assumed that the King stands above parties. He has to represent the whole of the nation by inherent right. His authority is not conferred upon him by a majority of the people, but is founded on the historical connection between the dynasty and the country. Now the high officials of the commonwealth, deriving their authority from the crown and called to execute the will of the monarch, are expected also not to be party men, or, at least, not strictly party men. Also for them party interest has to vanish. Even if formerly belonging to



a party, a Reichskanzler or a minister has to conduct himself as if he were not a party man.

Indeed, a party government in Germany would be nearly impossible. We have plenty of parties, none of which can hope to gain a parliamentary majority for itself. We have Conservatives and Liberals in various colors, we have also a great Catholic party, and a dangerous party of social democrats. Thus the majority in each special case may be formed by a different party combination. Such parties as we have now in Germany are not capable of governing. Therefore the German government is still carried on to-day, as it was in the time of absolutism, mainly by men who belong to the class of standing officers. The prevailing force in German public life is the activity of learned men, who are educated and trained for the public service, serve the state for life, and devote all their thought and effort to the public weal. The Reichskanzler and the ministers are not necessarily, but are ordinarily, chosen from this great body of officers. In this case they retain their official character, only they are elevated for a time to higher rank and charged with special duties. In every case such men seem to be the leading members of the official class. Thus instead of a party government we have in Germany a bureaucratic government, modified by the influence of popular parties. The German bureaucracy has not abdicated. Also it has preserved its inherent virtues. Many people think it has retained too many of its immanent faults.

The differences between the two great federative commonwealths of America and Europe are, therefore, fundamental, and must be evident even to a superficial observer. But the writer hopes that it will have been seen that, in spite of the inevitable contrast between republican and monarchical institutions, there exists also a surprising resemblance and many accordant features.

We have forgotten since the time of our fathers to put the question, once discussed as the fundamental problem of political theory, Which constitution is the best one? We believe no more in a natural law that should be revealed by the human reason and would prescribe a rational constitution fit for every people in every epoch. Thus in comparing the public law of different countries we endeavor no longer to discover any absolute superiority of either of them, but we ask only whether the constitutional law of each country accords with its public feelings and wants.

And that is, in the opinion of the writer, at last the greatest similarity between American and German public life, — that on both sides of the ocean people regard their constitution as the emanation of national spirit and the guarantee of national weal. Germans and Americans attribute in a high degree the rapid growth of culture and material well-being in their countries to the powerful unity, saved in America, and created in Germany, by blood and iron in a civil war, and typified in each case by a great man, your Lincoln and our Bismarck. Germans and Americans both acknowledge the benefits of the federal system, which prevents the proper life of parts being swallowed up by that of the whole, and protects sound decentralization and vigorous self-government. They have an abiding sentiment for the historic ground they stand on. Thus we may hope that the progress of national life will be secured by developing constitutional law by constitutional ways and means without new revolutionary crises. We may also hope that the common origin of peoples, the affinity of public institutions, and the harmony in political views will contribute to the growth of the friendly relations between the great Republic and the mighty Empire, and of intimate sympathy between the two nations.

*Otto Gierke.*

UNIVERSITY OF BERLIN.



# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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JAMES BARR AMES, Dane Professor of Law and Dean of the Harvard Law School since 1895, died at Wilton, N. H., January 8, 1910. Many are the teachers whose intellects command the admiration of their students, but few are those for whom their students feel a real and sincere affection. Dean Ames was both admired and loved. The genius of his clear mind was our inspiration and made to thrill with live and human interest, subjects which might have proven dry and tedious. His kindly interest and ever present sympathy in our work brightened our student lives. Though tireless in his own labors, he was never too busy to hear our often trivial questions or to help us in our difficulties. He never sermonized: his life was a sermon.

As a Trustee of the HARVARD LAW REVIEW since its founding and as a frequent contributor to its pages, Dean Ames has been to this Review a friend for whose services we are deeply grateful. It is planned to make the March issue a memorial number.

THE LAW SCHOOL. — Professor Samuel Williston, LL.B. 1888, one of the founders of the HARVARD LAW REVIEW, has been appointed Acting Dean. The courses in Pleading and Equity II will be conducted, for the rest of the school year, by Mr. Austin W. Scott, LL.B. 1909, and the course in Equity III by Mr. Charles F. Dutch, LL.B. 1905, both former editors of this Review.

THE CONSTITUTIONALITY OF THE NEBRASKA BANK DEPOSITORS' GUARANTY LAW. — The courts have declared that the exercise of the state police power is subject to judicial review under the "equal protection" and "due process" clauses of the 14th Amendment.<sup>1</sup> From these restrictions a doctrine has been evolved that the legislative action must be "reasonable"; that is, it must not be arbitrary, and must be designed to accomplish some recognized purpose of the government, which purpose must have an intimate relation to the means employed.<sup>2</sup> Since the determination of such a question is necessarily one of fact, the Supreme Court has refused to define what constitutes a reasonable exercise; each case must be decided on its particular circumstances. Thus, it is recognized that what is a proper exercise of the police power will vary according to locality and according to changing economic and social ideals.<sup>3</sup> Although some premature legislation has been checked by the courts,<sup>4</sup> there is no doubt that their determinations are influenced by the spirit of the times; and they refuse to interfere with police regulations unless the character or purpose thereof is utterly unreasonable.<sup>5</sup> Legislation in furtherance of those fundamental social interests which relate to the health, safety, morals, and general welfare of the community have been universally upheld.<sup>6</sup> Similar regulation of economic interests is still in the experimental stage, and the courts have shown no tendency to permit the breaking down, under an unlimited police power, of the constitutional safeguards to private enterprise, or to return to the paternalistic regulation of business which obtained in mediæval England. Statutes designed to prevent fraud and oppression have, however, been repeatedly upheld.<sup>7</sup> In a recent decision a statute which interfered with economic interests by compelling incorporation as a condition to doing a banking business, and by requiring contributions to a deposit guaranty fund, was held invalid. *First National Bank of Holstein v. Shallenberger*, 172 Fed. 999 (Circ. Ct., D. Neb.).

Under the present-day individualistic conception of government, the prevention of risk in private enterprise seems never to have been exercised as a governmental function. Yet since early days statutes have required of banks that they have licenses, that they submit to inspection, that they have a certain reserve, and that their investments be restricted.<sup>8</sup> These regulations, though at times aimed against fraud, also plainly seek to lessen the risk of depositors.<sup>9</sup> When questioned, they have been universally upheld, not, however, because they prevent risk, but because there

<sup>1</sup> *Atlantic Coast Line Ry. Co. v. N. C. Corporation Commission*, 206 U. S. 1.

<sup>2</sup> *Chicago, Burlington, & Quincy Ry. v. Illinois*, 200 U. S. 561, 592; *Lawton v. Steele*, 152 U. S. 133, 137.

<sup>3</sup> *Holden v. Hardy*, 169 U. S. 366. See 14 HARV. L. REV. 273, 276.

<sup>4</sup> *City of Chicago v. Gunning System*, 214 Ill. 628; *Ex parte Hodges*, 87 Cal. 162; *Wilkins v. Jewett*, 139 Mass. 29.

<sup>5</sup> *Gundling v. Chicago*, 177 U. S. 183, 188.

<sup>6</sup> *Commonwealth v. Carter*, 132 Mass. 12; *Yick Wo v. Hopkins*, 118 U. S. 356; *People v. Ewer*, 141 N. Y. 129.

<sup>7</sup> *Ozan Lumber Co. v. Union County Bank*, 207 U. S. 251; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 20.

<sup>8</sup> *Blaker v. Hood*, 53 Kan. 499; *State v. Ritchcreek*, 167 Ind. 217; *People v. Utica*, 15 Johns. (N. Y.) 358; FREUND, POLICE POWER, §§ 400, 450.

<sup>9</sup> *Meadowcroft v. People*, 163 Ill. 56.



is an established doctrine that the banking business, owing to its intimate relation to the fiscal affairs of the people, is subject to the police power.<sup>10</sup> It is submitted that the requirement of contributions to a safety fund differs only in degree from recognized banking regulations, and is not so unreasonable as to merit the judicial veto.<sup>11</sup> If the correct ground for legislative interference is kept in mind, there is no reason to fear the wholesale regulation of private business which the circuit court so vividly depicts. Nor should the statute in question be considered an arbitrary regulation merely because there may be some other business which should be similarly controlled.<sup>12</sup>

It is objectionable, however, on another ground. To provide for compulsory incorporation is unreasonable. Since incorporation is open to all, there is not a total prohibition of the business; but as banking is recognized as a legal calling,<sup>13</sup> even such a partial inhibition of individual liberty can be justified only because the character of the business allows it. That very circumstance, however, justifies the regulation of individuals as well as corporations so engaged. It follows, therefore, that the provision is an unwarrantable exercise of the police power,<sup>14</sup> since the means is unnecessary to accomplish the legislative purpose, and since it is unduly oppressive of individuals.<sup>15</sup>

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THE POWER OF MUNICIPAL CORPORATIONS TO EXPEND FUNDS IN THE INVESTIGATION OF MUNICIPAL PROBLEMS. — An important extension in the incidental powers of a municipal corporation is recognized in a recent case. The common council of the city of Detroit placed a sum of money, for use in investigating the local street railway problem presented by the pending expiration of certain franchises, at the disposal of the mayor, who appointed to assist him a committee of fifty citizens. The court restrained any payment from this fund on the grounds that the method of payment was contrary to mandatory provisions of the city charter, and that the appropriation was for the purpose of aiding the mayor rather than the common council. But the dissenting opinion on this latter point and the *dictum* of the majority give full recognition to the right of the council to expend funds in collecting information or advice regarding municipal matters. *Attorney General ex rel. Maguire v. Murphy*, 122 N. W. 260 (Mich.).

The power of the legislative branch of a municipal corporation to delegate any duty of investigation, such as that of examining the validity of elections to its membership, to a committee of its own members whose

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<sup>10</sup> *Blaker v. Hood*, *supra*; *State v. Ritchcreek*, *supra*. Cf. *Commonwealth v. Vrooman*, 164 Pa. 306.

<sup>11</sup> *Noble Bank v. Haskell*, 99 Pac. 590 (Ok.). In this case a similar safety fund requirement was upheld. In a recent decision in the district court at Topeka, Kansas, as yet unreported, the court held the statutory provision unconstitutional. In several earlier decisions the constitutionality of similar statutes was not questioned. *People v. Walker*, 17 N. Y. 502; *Elwood v. Treasurer of Vermont*, 23 Vt. 701. See 22 HARV. L. REV. 231.

<sup>12</sup> *Seaboard Airline Ry. v. Seegers*, 207 U. S. 73; *Heath v. Worst*, 207 U. S. 338.

<sup>13</sup> *Bank of Augusta v. Earle*, 13 Pet. 519, 596.

<sup>14</sup> *State of South Dakota v. Scougal*, 3 S. D. 55. *Contra*, *State of North Dakota v. Woodmansee*, 1 N. D. 246; *Commonwealth v. Vrooman*, *supra*.

<sup>15</sup> *Lawton v. Steele*, *supra*.

expenses are paid out of the city treasury is admitted.<sup>1</sup> But although it is doubtless the practice of city councils to pay the expenses incurred by committees in investigating general municipal problems, as well as the fees of experts who aid the local superintendents and engineers, the legal limitations on such expenditures are not adequately determined by the few adjudicated cases. Certainly the fulfillment of a project so studied must lie within the power of the city.<sup>2</sup> And the matter should be one requiring scientific investigation beyond the ordinary knowledge of any city official; for obviously a municipal corporation cannot expend the public funds in educating its officials. To what extent an inquiry may be conducted — whether it may be local only, or may include the study of methods in other municipalities — must be determined by the common-law requirement that all ordinances within the powers of a municipality to enact shall be reasonable.<sup>3</sup> Perhaps the personnel of the committee should be left under this same broad regulation — although here the courts have rendered some assistance in holding that the traveling expenses of a committee consisting of the entire city council, appointed to visit neighboring cities for the investigation of various municipal matters, cannot be paid from the public funds.<sup>4</sup> In general it may be said that if a matter lies within the province of an established city department (fire, water, police, etc.) the head of the department would be the proper person to conduct an investigation at the instance of the city council; otherwise the standing committee of the council would be an appointment which the courts would recognize as reasonable. And outside assistance for the benefit of the departments or committee should take the form of expert advice, bearing the same relation to the knowledge of the department or council that the testimony of an expert does to the knowledge of the jury.<sup>5</sup> Such assistance could have been given in the principal case by the committee of citizens, which was presumably composed of men of broad business knowledge.

It is submitted that the courts, influenced by the political fact that the government of a modern city resembles the management of a large business enterprise, will recognize in municipal corporations an implied power to make reasonable appropriations for purposes such as the one here considered, which are necessary for efficiency in any business corporation, and which are not contrary to any charter requirement that all municipal funds must be expended for the public benefit.

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THE DOCTRINE OF MUTUALITY IN SPECIFIC PERFORMANCE. — As a result of the many early exceptions and later qualifications, little now remains of the once recognized rule that to gain specific performance there must have been mutuality of equitable remedy at the time of making the contract.<sup>1</sup> The true principle would seem to be, that equity will not compel

<sup>1</sup> *State v. Hayes*, Mayor, 50 N. J. L. 97.

<sup>2</sup> See *Briggs v. Mackellar*, 2 Abb. Prac. (N. Y.) 30, 58.

<sup>3</sup> *Hawes v. Chicago*, 158 Ill. 653.

<sup>4</sup> *James v. City of Seattle*, 22 Wash. 654.

<sup>5</sup> *Lincoln v. The Saratoga, etc., Railroad Co.*, 23 Wend. (N. Y.) 425.

<sup>1</sup> FRY, SPECIFIC PERFORMANCE, 3 ed., 215; *Norris v. Fox*, 45 Fed. 406.



specific performance if, after performing, the defendant's sole security for counter-performance by the plaintiff is a common-law remedy of damages which would be inadequate.<sup>2</sup> But when the damages recoverable at law are the precise *quid pro quo* bargained for, neither actual performance nor an equitable remedy for such performance is essential.<sup>3</sup> The only mutuality in fact necessary is that at the time of the decree the defendant be given or assured performance by the plaintiff or its equivalent, regardless of his lack of reciprocal remedy at the time of the bargain.<sup>4</sup> Thus specific performance may be had by a party who did not sign the memorandum required by the Statute of Frauds;<sup>5</sup> or by an infant, on coming of age, of a contract previously unenforceable by him.<sup>6</sup> Similarly, a vendor, whose inability to make perfect title bars his right to specific performance, may nevertheless be compelled to convey, sometimes with,<sup>7</sup> and sometimes without compensation for the deficiency.<sup>8</sup> And a defendant may be forced to perform his part of an agreement although fraud,<sup>9</sup> laches,<sup>10</sup> or a disregard of his duty as a fiduciary<sup>11</sup> prevents similar relief on his part. In all these instances the defendant receives performance by the plaintiff, fulfilled either voluntarily or as a condition of the decree.

Two other classes of cases are explainable only under the suggested revision of the former rule of mutuality. Specific performance will be decreed even though the plaintiff may, by subsequently exercising an option given by the contract, terminate his liability and leave the defendant without redress;<sup>12</sup> as the defendant in this case receives exactly what he bargained for by the terms of the contract, he cannot be heard to complain. In like manner, negative contracts, which also raised difficulties under the old rule, will be enforced by injunction although equity is without jurisdiction to compel performance of the affirmative side of the contract.<sup>13</sup> Here again the defendant receives his *quid pro quo*, since the injunction is conditioned upon the plaintiff's continuing to carry out his part of the agreement.<sup>14</sup>

Where the plaintiff has fully performed his side of the contract, although

<sup>2</sup> See 3 COL. L. REV. 1.

<sup>3</sup> Northern Central Ry. Co. v. Walworth, 193 Pa. St. 207. See *Lamprey v. St. Paul & Chicago Ry. Co.*, 89 Minn. 187, 192. Thus an agreement to lease in return for a later payment of rent could be specifically enforced by the lessee, since damages at law equal in amount to the rent would be the equivalent of performance.

<sup>4</sup> *Blanton v. Kentucky Distilleries & Warehouse Co.*, 120 Fed. 318, 350. See *Waring v. Manchester S. & L. Ry. Co.*, 7 Hare 482, 492; *Blackett v. Bates*, 1 Ch. App. 117, 124.

<sup>5</sup> *Hatton v. Gray*, 2 Ch. Cas. 164; *Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Central Land Co. v. Johnston*, 95 Va. 223.

<sup>6</sup> *Clayton v. Ashdown*, 9 Vin. Ab. 393. See 40 AM. LAW REG. N. S. 560.

<sup>7</sup> *Wilson v. Williams*, 3 Jur. N. S. 810; *Borden v. Curtis*, 48 N. J. Eq. 120.

<sup>8</sup> *Western v. Russell*, 3 V. & B. 187; *Harding v. Parshall*, 56 Ill. 219.

<sup>9</sup> WILLISTON, WALD'S POLLOCK ON CONTRACTS, 705-707. See *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331, 365.

<sup>10</sup> *Walton v. Coulson*, 1 McLean (U. S.) 120, 129; 41 AM. LAW REG. N. S. 341-345. See *South Eastern R. R. Co. v. Knott*, 10 Hare 125, 126.

<sup>11</sup> *Ex parte Lacey*, 6 Ves. 625.

<sup>12</sup> *Singer, etc. Co. v. Union B. & E. Co.*, 1 Holmes (U. S.) 253; *Philadelphia Ball Club, Ltd. v. Lajoie*, 202 Penn. 210, 219. *Contra*, *Ulrey v. Keith*, 237 Ill. 284.

<sup>13</sup> *Lumley v. Wagner*, 1 De G. M. & G. 604; *McCaull v. Braham*, 16 Fed. 37, and note.

<sup>14</sup> See *Stocker v. Wedderburn*, 3 Kay & J. 393, 404; *General Electric Co. v. Westinghouse Electric Co.*, 151 Fed. 664, 672; 20 HARV. L. REV. 57.

not compellable in equity to do so, the true requirements of mutuality have been satisfied so as to entitle him to specific performance.<sup>15</sup> Substantial,<sup>16</sup> and by some courts even part performance,<sup>17</sup> has also been held sufficient. Though perhaps technically incorrect, it is equitable that substantial performance should be enough; but mere part performance should never suffice, since the defendant is not given or assured his equivalent. And the better authority supports this view.<sup>18</sup> In a recent case the plaintiff, having performed for three years his agreement to work certain lots continuously for an eight-year term, was allowed specific performance of the defendant's oral<sup>19</sup> promise to lease the property for that period. *Zelleken v. Lynch*, 104 Pac. Rep. 563 (Kansas). The defendant's objection of lack of mutuality was rightly overruled by the court, not because of the part performance, but, as in the negative contract cases, because of the court's ability to assure to the defendant his *quid pro quo* by the form of its decree. For the written lease ordered should rightly contain a clause of reëntry for breach of the covenant to mine continuously, and thus make the defendant's obligation conditional upon the plaintiff's continued performance.

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WHO MAY BE A PETITIONING CREDITOR IN BANKRUPTCY. — The right to institute involuntary proceedings in bankruptcy is vested by the Act of 1898 in "creditors who have provable claims."<sup>1</sup> Since a proper petition is necessary to give jurisdiction,<sup>2</sup> the judicial construction of these words is of the first importance. The courts seem generally to give more weight to the intent of the Act to furnish an equitable distribution of a debtor's property among his creditors, than to its literal language.<sup>3</sup> Thus certain provable claims will not qualify any creditor to petition, while the right of a creditor to petition, who has assented to assignments, or is a preferred creditor, is restricted or denied. Although the statute in terms includes all provable claims, the right of the petitioning creditor must have existed as a provable claim at the date of the act of bankruptcy.<sup>4</sup> This excludes

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<sup>15</sup> *Boyd v. Brown*, 47 W. Va. 238; *Lane v. M. & T. Hardware Co.*, 121 Ala. 296 (Performance of promise to erect buildings); *Topeka Water-Supply Co. v. Root*, 56 Kans. 187 (Performance of promise to render services); *Dresel v. Jordan*, 104 Mass. 407 (Acquisition of title since time of bargain). For this reason the doctrine of mutuality is inapplicable to unilateral contracts. *Howe v. Watson*, 179 Mass. 30; *Spires v. Urbohn*, 124 Cal. 110.

<sup>16</sup> *Howard v. Throckmorton*, 48 Cal. 482; *Thurber v. Meves*, 119 Cal. 35. Cf. *Welch v. Whelpley*, 62 Mich. 15 (Unilateral contract).

<sup>17</sup> *University of Des Moines v. Polk County H. & J. Co.*, 87 Ia. 36; *Minn. & St. Louis Ry. Co. v. Cox*, 76 Ia. 306.

<sup>18</sup> *Cooper v. Pena*, 21 Cal. 403; *Ikerd v. Beavers*, 106 Ind. 483; *Bourget v. Monroe*, 58 Mich. 563.

<sup>19</sup> Possession taken by the plaintiff, supplemented by improvements, was sufficient part performance according to the law of the jurisdiction to take the case out of the Statute of Frauds. *Bard v. Elston*, 31 Kans. 274.

<sup>1</sup> § 59 b.

<sup>2</sup> *Re Burlington Malting Co.*, 109 Fed. 777. The sufficiency of the petition is determined as of the date of adjudication. *Re Mammoth Pine Lumber Co.*, 109 Fed. 308.

<sup>3</sup> *Re J. M. Mertens & Co.*, 147 Fed. 177, 180.

<sup>4</sup> *Beers v. Hanlin*, 99 Fed. 695.



debts created,<sup>5</sup> or tort claims liquidated after that date,<sup>6</sup> but not an unliquidated claim for a prior breach of contract.<sup>7</sup> But it is unnecessary that the petitioner should himself have owned the claim at the date of the act of bankruptcy, for an assignee will succeed to his assignor's rights in this respect.<sup>8</sup> A recent decision holds, however, that a creditor cannot avoid the requirement of three or more petitioning creditors<sup>9</sup> by assigning parts of his claim to separate persons for the express purpose of qualifying them as petitioning creditors. *In re Lewis F. Perry & Whitney Co.*, 172 Fed. 745 (Dist. Ct., D. Mass.). In the same proceedings the court also decides that a stranger purchasing a claim against the debtor after the filing of the petition, for the express purpose of joining in the petition, will not be allowed to do so.<sup>10</sup> The objection to both schemes is based upon the spirit and policy of the Act rather than upon its express language: it can hardly be said that the protection of such creditors is within the purview of bankruptcy legislation.<sup>11</sup>

A creditor who, with full knowledge of the facts, has consented to an assignment for the benefit of creditors is generally held not to be a good petitioning creditor. This is put either on the ground of an accord and satisfaction of the creditor's claim,<sup>12</sup> or on the broad principle of an election of one of two inconsistent remedies.<sup>13</sup> Whether his consent to the assignment bars the creditor from petitioning on an act of bankruptcy distinct from the assignment is not clear. On the reasoning of the cases cited it should bar him, either *pro tanto*, if the first line of reasoning is adopted, or wholly, according to the second.<sup>14</sup> But if consent to the assignment was obtained by fraud, or given in ignorance of material facts, it is no bar to a petition alleging the assignment as an act of bankruptcy.<sup>15</sup>

The decisions are also in conflict as to the terms upon which a simple preferred creditor may petition upon his unsatisfied claim. The Act provides that his claim "shall not be allowed unless" he surrenders his preference.<sup>16</sup> And although some cases have construed this to prevent him from petitioning unless he surrenders,<sup>17</sup> the policy and language of the statute

<sup>5</sup> See *Re Callison*, 130 Fed. 987, 988. See under the Act of 1867, *Re Muller*, Fed. Cas. 9, 912.

<sup>6</sup> *Re Brinckmann*, 103 Fed. 65.

<sup>7</sup> *Frederick L. Grant Shoe Co. v. W. M. Laird Co.*, 212 U. S. 445.

<sup>8</sup> *Ex parte Thomas*, 1 Atk. 126.

<sup>9</sup> Namely, where the total number of creditors exceeds twelve. See § 59 b.

<sup>10</sup> *Re Lewis F. Perry & Whitney Co.*, 172 Fed. 752.

<sup>11</sup> *Lowenstein v. Henry McShane Mfg. Co.*, 130 Fed. 1007. Cf. *Ex parte Harper*, 20 Ch. D. 685; *Re Baker*, 5 Morr. Bankr. Cas. 5. *Contra*, *Re Bevins*, 165 Fed. 434.

<sup>12</sup> *Re Romanow*, 92 Fed. 510. Cf. *Good v. Cheesman*, 2 B. & Ad. 328; *Re Miner*, 104 Fed. 520.

<sup>13</sup> *Moulton v. Coburn*, 131 Fed. 201, 203. Cf. *Lowenstein v. Henry McShane Mfg. Co.*, *supra*.

<sup>14</sup> But see *Salmon v. Salmon*, 143 Fed. 395, 405. Creditors who assent to a general assignment would seem also to fall under § 57 g. See note 16, *infra*, and *Re Gutwillig*, 92 Fed. 337.

<sup>15</sup> *Canner v. Webster Tapper Co.*, 168 Fed. 519. See *Re Curtis*, 94 Fed. 630.

<sup>16</sup> Under the amendment of 1903 the prohibition of § 57 g applies to "creditors who have received preferences voidable under section sixty, subdivision b, or to whom . . . transfers, . . . or incumbrances, void or voidable under section sixty-seven, subdivision c, have been made. . . ." The effect of this provision on the right to petition has thus far been considered only as to preferred creditors.

<sup>17</sup> *Re Fishblate Clothing Co.*, 125 Fed. 986.

would seem satisfied by requiring a surrender of the preference as a condition to adjudication, but not to the right to petition;<sup>18</sup> for a distinction is apparently taken in both the present statute and that of 1867, between the *proof*, *i. e.*, the filing of a claim provable under § 63, and its *allowance*.<sup>19</sup>

RUNNING OF THE BURDEN OF COVENANTS WITH THE LAND AT LAW. — Where the burden of a covenant runs with the land and there is no contractual relation between the parties, they are bound, it is said, by "privity of estate." Just what constitutes privity of estate when both parties have not estates in the land, that is, when the relation of landlord and tenant does not exist, is a difficult question, owing to the confused state of the authorities.

Whatever may have been the early law,<sup>1</sup> the present general doctrine in England is, that privity of estate exists only where there is the relation of landlord and tenant.<sup>2</sup> If, however, the covenant can be construed as a grant of an easement or profit, the burden of the right so created will run.<sup>3</sup> Furthermore, the burden of a covenant to pay for damages incidentally caused by exercising a profit has been, in effect, allowed to run, on the theory that the substance of the right granted was to take, but pay.<sup>4</sup> In three jurisdictions in this country, the doctrine may be as closely limited as in England;<sup>5</sup> but most states, starting with the rule that an easement may be created by an instrument sounding in covenant,<sup>6</sup> have readily advanced to the position that further covenants in support of such an easement, which cannot from their subject matter constitute additional easements, bind the owner of the servient tenement.<sup>7</sup> So, the general rule in this country is that, in the absence of the relation of landlord and tenant, there is privity of estate if the interest of one party in the other's land is

<sup>18</sup> *Re Horntstein*, 122 Fed. 266. *Cf. Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 212 U. S. 445, 448.

<sup>19</sup> Under the Act of 1867, (14 Stat. at L. 517), see §§ 22, 23, 27, 29, 30, 33, 34. Under the Act of 1898 see §§ 57, 63. See also, in the English Bankruptcy Act (46 & 47 Vict. c. 52), Schedule II, § 22.

<sup>1</sup> See SIMS, COVENANTS, 58, 62.

<sup>2</sup> *Haywood v. Brunswick, etc. Society*, 8 Q. B. D. 403.

<sup>3</sup> *Rowbotham v. Wilson*, 8 H. L. C. 348.

<sup>4</sup> *Aspden v. Seddon*, 1 Ex. D. 496. A result like the running of the burden of a covenant to pay for a part of a party wall on using it, has been reached on an unsatisfactory theory of implied contract. *Irving v. Turnbull*, [1900] 2 Q. B. 129.

<sup>5</sup> *Pittsburgh, C. & St. L. Ry. Co. v. Bosworth*, 46 Oh. St. 81, but *cf. Hickey v. Railway Company*, 51 Oh. St. 40. See *Tardy v. Creasy*, 81 Va. 553; *Brewer v. Marshall & Cheeseman*, 19 N. J. Eq. 537. The actual decisions of the last two cases are not incompatible with the burden's running more freely. *Cf. Costigan v. Pennsylvania R. R. Co.*, 54 N. J. L. 233.

<sup>6</sup> *Conduitt v. Ross*, 102 Ind. 166; *Weill v. Baldwin*, 64 Cal. 476.

<sup>7</sup> *Fitch v. Johnson*, 104 Ill. 111; *Nye v. Hoyle*, 120 N. Y. 195. The same result has been reached with covenants in aid of a profit. *Morse v. Aldrich*, 19 Pick. (Mass.) 449; *Crawford v. Witherbee*, 77 Wis. 419. Or a rent charge. *Herbaugh v. Zentmyer*, 2 Rawle (Pa.) 159; *Van Rensselaer v. Hays*, 19 N. Y. 68. But an equitable lien on the land, other than a mortgagor's interest (*Barron v. Whiteside*, 89 Md. 448), does not constitute privity of estate. *Edwards v. Meader*, 11 N. Y. Supp. 285; *Fresno Land Co. v. Rowell*, 80 Cal. 530.



an incorporeal hereditament. But this is commonly the limitation of the doctrine;<sup>8</sup> and to this extent there is, on the whole, unanimity.

The confusion arises in two ways. In the first place, privity of estate is frequently extended to include covenants imposing affirmative duties on the covenantor, as creating easements of a spurious nature.<sup>9</sup> And the courts, not unnaturally, have differed as to what covenants may properly come within this class.<sup>10</sup> In the second place, a few courts have added a new principle, that a covenant contained in an instrument conveying the fee<sup>11</sup> runs with the land, if such is the intent of the parties, and if the burden is one which, consistently with public policy,<sup>12</sup> can be imposed on the land. Thus it was recently held that where in a deed conveying the fee, the grantee, a railroad company, covenanted to build and maintain a station on the land granted, the grantee in fee of the covenantor was bound by the covenant. *Louisville, H. & St. L. Ry. Co. v. Baskett*, 121 S. W. 957 (Ky.).<sup>13</sup> This principle is preferable to that definition requiring always the existence of an incorporeal hereditament. In the first place, it has been pointed out that privity of estate formerly meant merely succession to the title of a party to the covenant.<sup>14</sup> And the historical basis for recognizing as easements obligations imposing active duties on the owner of the servient tenement is not entirely satisfactory: probably all the old cases can be explained as local customs.<sup>15</sup> It is submitted, moreover, that the doctrine of the main case is a simpler and more straightforward way of carrying out the intention of the parties, while at the same time avoiding the evils of unduly restricting the use and alienation of land,<sup>16</sup> or forcing an unexpected burden on an innocent purchaser. For by limiting<sup>17</sup> the doctrine to covenants in the deed passing the estate with which the burden is to run, the protection of the recording acts is secured.

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**IMPUTED NEGLIGENCE.** — The law of imputed negligence is gradually crystallizing into two general rules. When A sues B, his recovery is barred by the contributory negligence of C (1) when the law identifies A with C,

<sup>8</sup> *Hurd v. Curtis*, 19 Pick. (Mass.) 459.

<sup>9</sup> *Bronson v. Coffin*, 108 Mass. 175.

<sup>10</sup> Compare *Hurd v. Curtis*, *supra*, with *Horn v. Miller*, 136 Pa. St. 640; and *Wheeler v. Schad*, 7 Nev. 204, with *Farmers' Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 40 Colo. 467.

<sup>11</sup> The burden has been held not to run with the grant of an incorporeal hereditament. *Barringer v. Virginia Trust Co.*, 132 N. C. 409. Obviously where the estate conveyed is less than a fee, there is the relation of landlord and tenant.

<sup>12</sup> The cases cited in note 16 are examples of the limitation imposed by public policy.

<sup>13</sup> *The Georgia Southern Railroad v. Reeves*, 64 Ga. 492, *accord*. See *Sexauer v. Wilson*, 136 Ia. 357; *Conduitt v. Ross*, *supra*.

<sup>14</sup> *HOLMES, COMMON LAW*, 404; *SIMS, COVENANTS*, 69. See *Norcross v. James*, 140 Mass. 188.

<sup>15</sup> See *Tenant v. Goldwin*, Ld. Raym. 1089. Cf. *Yielding v. Fay*, Cro. Eliz. 569; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Inhabitants of Middlefield v. Church Mills Knitting Co.*, 160 Mass. 267, may be explained as creating a charge on the land, rather than an active duty.

<sup>16</sup> For example, by holding that the covenant does not "touch or concern" the land, *Costigan v. Pennsylvania R. R. Co.*, *supra*; or is in restraint of trade, *Tardy v. Creasy*, *supra*; or hampers alienation, *Haeussler v. Missouri Iron Co.*, 110 Mo. 188.

<sup>17</sup> *Wheeler v. Schad*, *supra*. *Contra*, *Robbins v. Webb*, 68 Ala. 393.

as in the case of principal and agent, master and servant; and (2) when A is the nominal plaintiff but C is the real beneficiary.

As the principal is liable for the torts of his agent, so the contributory negligence of the agent, within the scope of his employment and course of business, is imputed to the principal on the familiar doctrine that *qui facit per alium facit per se*.<sup>1</sup> In other relations, also, negligence has been imputed from one person to another; as, for example,<sup>2</sup> from parent to child,<sup>3</sup> from bailee to bailor.<sup>4</sup> In any of these relationships an agency may occur; and if so, it needs no extension of the rule to impute negligence.<sup>5</sup> But such relationship does not necessarily involve an agency; and unless there is an agency in fact, with its fundamental right of control, by the better opinion a fictitious agency will not be raised in order that negligence may be imputed.

The second rule is evidenced under statutes allowing compensation for injuries caused by death by wrongful act. Whether expressly so stated or not in these statutes, they are construed as providing that the negligence of the deceased bars recovery.<sup>6</sup> As to whether they should be construed to make the negligence of the beneficiary a similar bar, there is a conflict. Some courts hold that the plaintiff stands so squarely in the shoes of the deceased that they will not consider the negligence of a technical outsider, even though he be the beneficial party to the suit.<sup>7</sup> Directly *contra*, however, is a recent case voicing the majority view.<sup>8</sup> *Scherer v. Schlager*, 122 N. W. 1000 (N. Dak.). Although where the negligent person is only one of several beneficiaries the rule may well be otherwise,<sup>9</sup> yet where the sole distributee or next of kin is negligent he should not recover, whether he sues in his own name, or as administrator, or whether another sues as administrator for his real benefit.<sup>10</sup> Herein lies the real strength of the minor-

<sup>1</sup> *Page v. Hodge*, 63 N. H. 610.

<sup>2</sup> Other examples are: (a) From husband to wife, *Prideaux v. City of Mineral Point*, 43 Wis. 513, 528; *contra*, *Platz v. City of Cohoes*, 24 Hun (N. Y.) 101. (b) From public carrier to passenger. The case of *Thorogood v. Bryan*, 8 C. B. 115, though later overruled in England by *The Bernina*, 12 Pr. Div. 58, has been followed in several states. *Philadelphia, etc. R. R. Co. v. Boyer*, 97 Pa. St. 91; *contra*, *Little v. Hackett*, 116 U. S. 366. (c) From private driver to person driven, *Mullen v. City of Owosso*, 100 Mich. 103; *contra*, *Pyle v. Clark*, 79 Fed. 744.

<sup>3</sup> *Hartfield v. Roper*, 21 Wend. (N. Y.) 615. *Contra*, *Newman v. Phillipsburg Horse Car Co.*, 52 N. J. L. 446.

<sup>4</sup> *Welty v. Indianapolis, etc. Ry. Co.*, 105 Ind. 55; *Ill. Cent. R. R. Co. v. Sims*, 77 Miss. 325. *Contra*, *Sea Insurance Co., etc. v. Vicksburg, etc. Ry. Co.*, 159 Fed. 676; *N. Y., L. E., etc. R. R. Co. v. New Jersey Electric Co.*, 60 N. J. L. 338.

<sup>5</sup> *Kessler v. Brooklyn Heights R. R. Co.*, 3 N. Y. App. Div. 426 (Driver, common enterprise); *Davis v. Guarnieri*, 45 Oh. St. 470 (Husband and wife).

<sup>6</sup> TIFFANY, DEATH BY WRONGFUL ACT, § 66.

<sup>7</sup> *Consolidated Traction Co. v. Hone*, 59 N. J. L. 275; *Wymore v. Mahaska County*, 78 Ia. 396.

<sup>8</sup> *Ploof v. Burlington Traction Co.*, 70 Vt. 509; *Richmond, etc. R. R. v. Martin's Adm'r*, 102 Va. 201 (overruling *N. & W. R. R. v. Groseclose's Adm'r*, 88 Va. 267). The attempt in *Tucker v. Draper*, 62 Nebr. 66, to reconcile the conflict on minor statutory details is unsound.

<sup>9</sup> *Davis v. Guarnieri*, 45 Oh. St. 470; 2 Ill. L. R. 487 (the ablest exposition of the whole matter).

<sup>10</sup> At law X is a distinct person from X, administrator. When, therefore, the plaintiff is not a beneficiary, his negligence should not bar recovery. KINKEAD, TORTS, § 475, takes the ground that this entire matter is not a question of imputed negligence at all, but direct contributory negligence. But whether the result is obtained by say-



ity view which imputes the negligence of the parent to a child *non sui juris*; for, although technically the recovery is solely for the use of the child,<sup>11</sup> practically the negligent parent is sole beneficiary. For a similar reason, where a wife sues with her husband joined for conformity, his right to the damages is reason for imputing his negligence to her.<sup>12</sup> And conversely, it should not be imputed where she recovers independently.<sup>13</sup>

At common law the parent or husband has an independent action for torts committed against his minor child or his wife, to which his own negligence is, of course, a bar.<sup>14</sup> But, as he is seeking to recover for injury to an interest of his own — an interest quite distinct from that which the person injured has in himself, and as the law allows recovery against either of two joint tort-feasors, it seems contrary to principle or policy to impute to him the negligence of the person injured.<sup>15</sup> The authorities, however, do not accept this view, and apparently sanction a third rule of imputed negligence to the effect that when A sues B for an injury done to C, the negligence of C will be imputed to A.<sup>16</sup>

THE MORTGAGOR'S RIGHT TO AN ACCOUNT FOR RENTS AND PROFITS. — In those states which retain the English theory of mortgage, a payment or tender on the law day automatically reverts title in the mortgagor.<sup>1</sup> As a matter of principle tender alone, being ineffective to extinguish the debt, should not have this effect. Nor should payment at any time other than the law day; for, although a personal satisfaction between the parties, such a payment is not a proper performance of the condition in the conveyance. By the weight of authority, however, payment at any time before maturity reverts the title.<sup>2</sup> Where the lien theory of mortgage prevails, a natural result of the fusion of law and equity on which this conception is based is, that payment of the debt either before or after the law day releases the mortgagee's lien.<sup>3</sup> Some courts have gone further in holding that a tender after maturity and before foreclosure releases the lien although it does not extinguish the debt.<sup>4</sup> But these decisions are against the weight of authority,<sup>5</sup> and are clearly unjustifiable; for even in equity the lien subsists until the debt has been actually paid.<sup>6</sup>

ing that the law overlooks the nominal plaintiff for the beneficiary, or that it imputes negligence from the beneficiary to the plaintiff under our second rule, is immaterial.

<sup>11</sup> BEACH, CONTRIBUTORY NEGLIGENCE, 182.

<sup>12</sup> Pennsylvania R. R. Co. v. Goodenough, 55 N. J. L. 577, 587.

<sup>13</sup> Atlanta, etc. Ry. v. Gravitt, 93 Ga. 369.

<sup>14</sup> Bellefontaine Ry. Co. v. Snyder, 24 Oh. St. 670. [The child was allowed to recover for injuries to herself.]

<sup>15</sup> BISHOP, NON-CONTRACT LAW, § 584. Especially under modern statutes enlarging the wife's independence. Honey v. Chicago, etc. Ry. Co., 59 Fed. 423. (Reversed.)

<sup>16</sup> Kennard v. Burton, 25 Me. 39; Winner v. Oakland Township, 158 Pa. St. 405, 410; Chicago, etc. Ry. Co. v. Honey, 63 Fed. 39, reversing an able decision *contra* in 59 Fed. 423.

<sup>1</sup> See Shields v. Lozear, 34 N. J. L. 496, 504.

<sup>2</sup> Burgaine v. Spurling, Cro. Car. 283; Flye v. Berry, 181 Mass. 442. But see Watson v. Wyman, 161 Mass. 96.

<sup>3</sup> See Shields v. Lozear, *supra*.

<sup>4</sup> Kortright v. Cady, 21 N. Y. 343; Caruthers v. Humphrey, 12 Mich. 270.

<sup>5</sup> Shields v. Lozear, *supra*. See 18 AM. L. REG. N. S. 182 note; 16 HARV. L. REV. 526.

<sup>6</sup> Tuthill v. Morris, 81 N. Y. 94.

Although under the title theory some courts, by denying the mortgagee's right to possession until default by the mortgagor,<sup>7</sup> illogically say in effect that a deed which purports to pass title at once does not do so until default, yet the general law is, that by reason of his legal title such a mortgagee acquires the right to immediate possession.<sup>8</sup> On the other hand, by the lien theory a mortgagee has no enforceable right to possession. When, however, he has once obtained lawful possession he cannot be ousted except by redemption.<sup>9</sup> Under both theories the mortgagee in possession must account for rents and profits.<sup>10</sup>

Where the mortgagee has the legal title the mortgagor's right to an account is purely equitable. It is an incident to the equity of redemption,<sup>11</sup> and consequently no longer exists when the mortgage has been extinguished.<sup>12</sup> Unquestionably the receipt of rents and profits does not, in either form of mortgage, amount to a legal satisfaction of the debt. Accordingly, there can be no garnishment of a mortgagor's right to an account;<sup>13</sup> and the mortgagor, in an action of ejectment, cannot show satisfaction of the debt by the mortgagee's receipt of rents and profits.<sup>14</sup> Even under a statute providing for the revesting of title upon payment of the mortgage debt, the receipt of rents and profits to this amount is not deemed a payment.<sup>15</sup> It is said that the mortgagee in possession takes the rents and profits in the character of a *quasi-trustee* or bailiff for the mortgagor;<sup>16</sup> and their receipt is treated as in the nature of an equitable set-off to the amount due on the mortgage debt.<sup>17</sup> A mortgagee in rightful possession is always entitled to reimbursement for improvements, taxes, repairs, etc.; and until an accounting has been taken in a court of equity the debt is unsatisfied and the position of the parties unchanged.<sup>18</sup> But where in a suit for foreclosure the mortgagor asks for an accounting, he is clearly entitled to have the amount received in rents and profits set off against the mortgage debt. *Hoye v. Bridgewater*, 118 N. Y. Supp. 951 (Sup. Ct., App. Div.).

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**LEGAL EFFECT OF AN INSTRUMENT AS AFFECTED BY THE PAROL EVIDENCE RULE.** — It is a general rule that when any judgment, disposition of property, agreement, or other undertaking has been reduced to writing, and is evidenced by a document or a series of documents, the contents of such documents cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence.<sup>1</sup> This rule is founded on the presumption that all terms and conditions have been integrated in the document. It is

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<sup>7</sup> *Barnett v. Timberlake*, 57 Mo. 499.

<sup>8</sup> *Gilman v. Wills*, 66 Me. 273.

<sup>9</sup> *Becker v. McCrea*, 94 N. Y. Supp. 20.

<sup>10</sup> See *Hubbell v. Moulson*, 53 N. Y. 225; *Dawson v. Drake*, 30 N. J. Eq. 601.

<sup>11</sup> *Seaver v. Durant*, 39 Vt. 103.

<sup>12</sup> *Wilcox v. Cheviott*, 92 Me. 239.

<sup>13</sup> *Toomer v. Randolph*, 60 Ala. 356.

<sup>14</sup> *Green v. Thornton*, 96 Pac. 382 (Cal.).

<sup>15</sup> *Farris & McCurdy v. Houston*, 78 Ala. 250.

<sup>16</sup> See *Hubbell v. Moulson*, *supra*.

<sup>17</sup> See *Green v. Thornton*, *supra*.

<sup>18</sup> See *Hubbell v. Moulson*, *supra*.

<sup>1</sup> *Angell v. Duke*, 32 L. T. R. N. S. 320.



really a statement in terms of evidence of the rule of the substantive law, that when a legal act is reduced into a single memorial all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.<sup>2</sup> The substantive law makes certain exceptions, however. For example, oral evidence is admitted to rebut an equitable presumption, and thus support the instrument as it appears on its face. So, parol evidence is admissible to rebut the equitable presumption that a conveyance of land for which the consideration is furnished by a third person gives rise to a resulting trust in favor of such third person;<sup>3</sup> or that a conveyance to a child, for which the consideration is furnished by the parent, is as a gift or advancement;<sup>4</sup> or that a conveyance paid for by the husband and taken in the name of his wife is a provision for her.<sup>5</sup>

A second exception to the rule of substantive law is, that when a contract is proved to be incomplete, by circumstances showing that the parties must have intended something else, evidence of another agreement is admissible.<sup>6</sup> The question in such cases is whether there is a vacuum to be filled; that is, whether there appears to be no express mention of an important detail, which the law will not supply. If, however, the defect is such as will be supplied by legal presumption, the want of express provision leaves no vacuum; the legal meaning of a written instrument, though not apparent from the terms of the instrument itself, can no more be explained, contradicted, or controlled by parol or extrinsic evidence, than if such meaning had been expressed. Thus if there is in a written contract no specification as to time of performance, the legal presumption is that performance must be within a reasonable time<sup>7</sup> and that payment is not to be until the other party has performed;<sup>8</sup> if no time for payment, that payment must be on demand;<sup>9</sup> if no price, that a reasonable price must be paid.<sup>10</sup> In none of these cases is parol evidence admissible, since the law has permitted no vacuum.<sup>11</sup> Similarly, parol evidence cannot be introduced for the purpose of changing the effect attached by the law to certain transactions, such as the assignment of a mortgage note, which, in the eye of the law, is an assignment of the security also;<sup>12</sup> or the indorsement in blank of a bill or note, which makes the indorser a guarantor;<sup>13</sup>

<sup>2</sup> *Pitcairn v. Philip Hess Co.*, 125 Fed. 110. See THAYER, PRELIM. TREATISE EVIDENCE, p. 397.

<sup>3</sup> *Livermore v. Aldrich*, 5 Cush. (Mass.) 431.

<sup>4</sup> *Taylor v. Taylor*, 9 Ill. 303.

<sup>5</sup> *Wallace v. Bowen*, 28 Vt. 638.

<sup>6</sup> *Gould v. Boston Excelsior Co.*, 91 Me. 214. See *Wheaton, etc. Co. v. Coye Mfg. Co.*, 66 Minn. 156.

<sup>7</sup> *Atwood v. Cobb*, 16 Pick. 227.

<sup>8</sup> *Thompson v. Phelan*, 22 N. H. 339.

<sup>9</sup> *Thompson v. Ketcham*, 8 Johns. (N. Y.) 190.

<sup>10</sup> *Williams v. Kansas City, etc. Ry. Co.*, 85 Mo. Ap. 103.

<sup>11</sup> Other instances are contracts for personal service which, if silent as to duration, either party may terminate at pleasure. *Irish v. Dean*, 39 Wis. 562. And engagements to perform an act, where evidence that the other party orally agreed to supply certain means is inadmissible because the engagement from its nature involved undertaking to secure the means necessary to the accomplishment of the object. *Godkin v. Monahan*, 83 Fed. 116.

<sup>12</sup> *Pattison v. Hull*, 9 Cow. (N. Y.) 747.

<sup>13</sup> *Martin v. Cole*, 104 U. S. 30. *Contra*, *Dickenson v. Burke*, 8 N. D. 118.

or the absolute grant of land so situated that egress necessitates a way over the grantor's land.<sup>14</sup>

By a novel extension of these principles, a recent case decided that where an offer had been made in writing and an acceptance, also in writing, had been made more than a reasonable time thereafter, parol evidence of an agreement by the offeror to continue the offer was not admissible. *Standard Box Co. v. Mutual Biscuit Co.*, 103 Pac. 938 (Cal.). The soundness of the extension may be doubted, for the contract of the parties may well have been concluded by the written acceptance of the parol offer, the latter incorporating the terms of the earlier written offer.

## RECENT CASES.

ACCOUNT — DUTY TO ACCOUNT — REQUISITE FIDUCIARY RELATION NOT ESTABLISHED BY CONTRACT. — In consideration of a royalty equivalent to 25 per cent of the net profits of the business as continued by the defendants, the plaintiff sold his business to them together with an exclusive license for the use of his trademarks for a limited period. The defendants thereafter created the B. company to exploit a cheaper grade of perfumery, not bearing the plaintiff's trademarks. The plaintiff sought an accounting of the B. company's business. *Held*, that the plaintiff has no remedy in equity. *Thompson v. Crown Perfumery Company & Batcheller Importing Company*, 42 N. Y. L. J. 845 (N. Y. App. D., Nov., 1909).

The plaintiff contended that the relation of the parties was that of quasi-partners, in which case the right to an accounting exists. *Marston v. Gould*, 69 N. Y. 220. And he alleged that such fiduciary relationship precluded the defendants from conducting any rival business, so that they were liable to account for the same. *Somerville v. Mackay*, 16 Ves. 382. It is clear that where there is a fiduciary relationship, equity will compel an accounting. *Harvey v. Sellers*, 115 Fed. 757. Otherwise, equity will not interfere. *Foley v. Hill*, 2 H. L. Cas. 28. The authorities, however, do not support the plaintiff's contention that a fiduciary relationship existed. If the defendants had agreed to pay over 25 per cent of the net profits as such, they would have become liable as quasi-trustees of a specific fund. *Pratt v. Tuttle*, 136 Mass. 233. On the other hand, an obligation to pay by way of royalty gives no ground for an account. *Moxon v. Bright*, L. R. 4 Ch. 292. And where the profits are merely designated as a measure by which to determine compensation, there is no fiduciary relation. See *Bradley v. Wolff*, 40 N. Y. Misc. 592. The plaintiff got no legal interest in the profits. His action was merely one upon a contract to recover royalties, and should have been brought at law. *Preston v. Smith*, 156 Ill. 359. The fact that a statement of an account between him and the defendants was necessary to establish his claim, did not require equitable action. *Smith v. Bodine*, 74 N. Y. 30.

AGENCY — PRINCIPAL'S LIABILITY TO THIRD PERSONS IN TORT — INJURIOUS FALSEHOOD BY AGENT. — The plaintiff's declaration alleged that salesmen of the defendant "while acting in the scope of their authority as such salesmen" made false statements about the plaintiff, intending to cause and actually causing damage to the plaintiff's business. *Held*, that the declaration states no cause

<sup>14</sup> *Isett v. Lucas*, 17 Iowa 503; *Lebus v. Boston*, 107 Ky. 98, takes an opposite view, but can be explained on the ground that really the oral agreement to release an existing way proved that the situation did not call for the imposition of a way of necessity.



of action against the defendant. *Duquesne Distributing Co. v. Greenbaum*, 121 S. W. 1026 (Ky.).

The rule that a master is liable for all torts committed by his servants in the scope of their authority, and in the course of the master's business, is applied to deceit and libel. See *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Citizens Life Assurance Co. v. Brown*, [1904] A. C. 423. But in cases of slander it has sometimes been denied. *Behre v. National Cash Register Co.*, 100 Ga. 213; *Singer Mfg. Co. v. Taylor*, 150 Ala. 574. In the principal case, the court treats the injurious falsehood as slander, and goes on the theory that, as the speaking of defamatory words is peculiarly subject to temporary emotions, as to which a master cannot control his servants, he should not be liable unless he authorizes or ratifies the slander itself. But this same theory would frequently be applicable to the falsehoods of deceit and libel. Moreover, an employee who, prompted entirely by personal motives or passions, utters slander, thereby departs from the scope of his authority. See *Sawyer v. R. R.*, 142 N. C. 1. Accordingly, few slanders by an agent will come within even the usual limits of the rule of *respondeat superior*; and the better view applies to oral defamation the same test for vicarious liability as to other torts. *Rivers v. Yazoo & Miss. R. R. Co.*, 90 Miss. 196; *Hypes v. Southern Ry. Co.*, 82 S. C. 315.

**BANKRUPTCY — DISCHARGE — OBTAINING PROPERTY BY FALSE STATEMENT IN WRITING.** — More than four months before the institution of bankruptcy proceedings, a bankrupt made a false statement in writing by which he obtained property on credit within four months of the institution of such proceedings. *Held*, that he is not entitled to a discharge. *In re Terens*, 172 Fed. 938 (Dist. Ct., E. D. Wis.).

Section 14 b of the Bankruptcy Act of 1898, as amended in 1903, provides that a bankrupt's application for a discharge will be denied if he has obtained property on credit from any person upon a materially false statement in writing. Although no specific time was fixed by the statute, within which such statement must be made, yet by analogy with other provisions of the act, it has been suggested that the statement must be made within the four months' period. See *BRANDENBURG, BANKRUPTCY*, 3 ed., § 370. The principal case seems correct in reaching a different conclusion, for the language of the statute is not ambiguous, and an unintentional omission should not be presumed, since the next sub-section, making concealment of assets, etc., a cause for refusing a discharge, expressly mentions the time within which such an act must be done to prevent a discharge.

**BANKRUPTCY — PREFERENCES — LIEN ON EXEMPT PROPERTY.** — Within four months of the making of a chattel mortgage, the mortgagor was adjudicated bankrupt. The mortgagee, though surrendering the mortgage as a preference, asserted a lien on certain property included in the mortgage. This was claimed by the bankrupt as exempt. The mortgagee then proved his whole claim against the bankrupt's estate; whereupon the bankrupt asked that the exemption in question be set apart. *Held*, that he may have this property free from any claim by the mortgagee. *In re Soper*, 173 Fed. 116 (Dist. Ct., D. Neb.).

Since exempt property is not subject to creditors' demands, its transfer is not a preference. See *Mills v. J. H. Fisher & Co.*, 159 Fed. 897. *Cf. Bloedorn v. Jewell*, 34 Neb. 649. And the title to exempt property does not pass to the trustee, but remains in the bankrupt. **BANKRUPTCY ACT OF 1898**, § 70 a; *Lockwood v. Exchange Bank*, 190 U. S. 294. In Nebraska, a mortgagor of chattels retains title, and the mortgagee has only a lien. *Drummond Carriage Co. v. Mills*, 54 Neb. 417. And a lienor may surrender part of his security and retain the rest. *Palmer v. Tucker*, 45 Me. 316. So it appears that the lien asserted against the exempt property belonging to the bankrupt was not a preference, and persisted after the surrender of the mortgage. But secured creditors' claims are allowed only for the sum owing above the value of the securities. **BANKRUPTCY ACT OF**

1898, § 57 *e*. And since the mortgagee proved his whole claim, he would seem to have waived his lien. *Ex parte Downes*, 1 Rose 96. Under similar provisions of previous bankruptcy acts, however, a secured creditor who proved his claim in ignorance of the effect was allowed to withdraw the proof and rely on the security. *Ex parte Harwood*, Fed. Cas. No. 6, 185; *In re Baxter*, 12 Fed. 72. Such a privilege should be given to the mortgagee in the present case, as from his assertion of the lien it is clear that he meant to keep it. Yet the principal case is right in holding that if the dividends on the claim are retained, the security is lost. *In re Lantzenheimer*, 124 Fed. 716.

**BANKRUPTCY — PROVABLE CLAIMS — RIGHT TO PROCEEDS OF CONVERTED STOCK.** — A broker converted stock belonging to his customer. At the time of his bankruptcy, other stock of the same kind was found in his possession. *Held*, that the customer is entitled to the stock as against the bankrupt's general creditors. *In re Brown & Co.*, 171 Fed. 254 (Dist. Ct., S. D. N. Y.).

A broker need not keep a customer's stock separate from that belonging to other customers or to himself. *Richardson v. Shaw*, 209 U. S. 365. *Contra*, *Van Voorhis v. Rea Bro. Co.*, 153 Pa. St. 19. But a broker must keep a sufficient number of shares of each kind of stock to meet all his outstanding obligations in that stock; otherwise he is guilty of a conversion. Nor will a re-purchase of the same kind of stock after the conversion relieve him from liability. *Taussig v. Hart*, 58 N. Y. 425. In the principal case, the re-purchase of the stock, even with the intention of appropriating it to the original customer, could not give the latter a right to it, especially since bankruptcy intervened. The result in the principal case should have been reached only if the funds which were produced by the broker's conversion and which he held as constructive trustee for his customer were capable of being followed into the new shares; upon this latter theory, the customer would have been protected by his equitable right to the new res. *Langton v. Waite*, L. R. 6 Eq. 165, 173; *In re Halletts Estate*, L. R. 13 Ch. 696, 711.

**BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — PUNISHMENT FOR CONTEMPT.** — A bankrupt appeared, by a preponderance of evidence, to be wilfully disobeying an order of the referee requiring him to surrender certain assets alleged to be in his possession. The court, however, was not satisfied beyond a reasonable doubt of the truth of these facts. *Held*, that it will not adjudge the bankrupt in contempt. *In re J. H. & A. P. Mize*, 22 Am. B. R. 577 (Dist. Ct., N. D. Ala., July, 1909).

For a discussion of the principles involved, see 23 HARV. L. REV. 30.

**BANKRUPTCY — WHO MAY BE A PETITIONING CREDITOR — SPLITTING CLAIMS.** — A made a general assignment for the benefit of his creditors. B, who held three notes made by A, thereupon endorsed two of them to C and D respectively, in order to qualify them as petitioning creditors. B, C, and D joined in a petition to have A adjudicated a bankrupt. *Held*, that C and D are not competent petitioners. *Re Lewis F. Perry & Whitney Co.*, 172 Fed. 745 (Dist. Ct., D. Mass.). See NOTES, p. 296.

**BILLS AND NOTES — CHECKS — PAYMENT OF STOLEN CHECK SIGNED IN BLANK.** — The defendant signed a check in blank and locked it up. It was stolen, and the plaintiff bank, on which it was drawn, cashed it. *Held*, that the defendant is liable for the amount of the check. *Trust Co. of America v. Conklin*, 42 N. Y. L. J. 793 (N. Y. Sup. Ct., Nov., 1909).

When a note is made to bearer, but not delivered by the maker, it is generally held that the latter is not liable even to a *bonâ fide* purchaser. *Burson v. Huntington*, 21 Mich. 415. *Contra*, *Shipley v. Carroll*, 45 Ill. 285. This result is based on the doctrine that delivery is an essential requisite of a valid note. It may be, however, that the maker's gross negligence will estop him from denying delivery.



*Ingham v. Primrose*, 7 C. B. N. S. 82. As there is no privity between the maker and a subsequent holder, the maker is under no duty to such a holder to refrain from signing such an instrument. But the relation of debtor and creditor between the depositor and the bank imposes upon the depositor a duty of care to the bank. *Timbel v. Garfield Nat. Bank*, 121 N. Y. App. Div. 870. On the grounds of business convenience a bank should only be required to ascertain the genuineness of the depositor's signature before paying the check. As the Negotiable Instruments Law provides that if an incomplete note is not delivered, it will not bind the maker, the principal case must be supported on the theory that the depositor owes the bank a duty not to place his signature on a check unless he expects it to be paid if regularly presented. See N. Y. LAWS OF 1898, ch. 336, § 34.

**BILLS AND NOTES — NEGOTIABILITY — CERTAINTY IN AMOUNT: ATTORNEY'S FEES.** — A promissory note contained an additional promise to pay counsel fees if collected by an attorney. *Held*, that the instrument is not negotiable. *American Machinery & Export Co. v. Druge Bros.*, 74 Atl. 84 (Vt.).

Two elementary requirements of a negotiable note are: (1) that it must contain a promise to pay a sum certain in money; and (2) that it must not contain an independent agreement to do anything else. *Smith v. Nightingale*, 2 Stark. 375; *Martin v. Chantry*, 2 Str. 1271. Apart from the cases which hold a promise to pay attorney's fees invalid because usurious, notes like the one in the principal case have been attacked as violating both of these requirements. *Woods v. North*, 84 Pa. St. 407; *First Nat. Bank v. Larsen*, 60 Wis. 206. But it is generally held that a promise to pay a certain sum and the current rate of exchange is negotiable, though the amount to be paid is mathematically uncertain. *Hastings v. Thompson*, 54 Minn. 184. *Contra*, *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442. And a note is negotiable though it contains a provision that the holder shall have the option of demanding something else instead of payment in money. *Hosstatter v. Wilson*, 36 Barb. (N. Y.) 307. Similarly it would seem that a note containing a promise to pay attorney's fees should be negotiable. Until maturity the amount to be paid is certain, and the additional promise cannot possibly impair the note's commercial usefulness. *Sperry v. Horr*, 32 Ia. 184; *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 52 Fed. 191. Such is the rule adopted in the Negotiable Instruments Law. See BRANNAN, NEG. INST. L. p. 2, § 2.

**CARRIERS — CUSTODY AND CONTROL OF GOODS — WHEN RAILROAD BECOMES WAREHOUSEMAN.** — A traveling salesman left his trunk four days at the defendant's terminal depot which was also the initial depot for his next trip. The lower court charged that the jury might consider the defendant's habit of allowing this, as a silent consent to keep the goods as a common carrier, and might hold it liable for destruction of the goods by fire without negligence. *Held*, that the instruction is correct. *McCoy v. Atlantic Coast Line*, 65 S. E. 939 (S. C.).

In South Carolina, strict carrier's liability begins when baggage is delivered within a reasonable time before transportation is to commence, although not yet checked, and after the arrival of the goods at their destination, seems to last until a reasonable time for their removal. *Fleischmann v. R. R.*, 76 S. C. 237. See *Murphy v. Ry.*, 77 S. C. 76. Notice of arrival would probably not then be required. See *Spears v. R. R.*, 11 S. C. 158. The custom of keeping the trunks might possibly bear on the reasonableness of the time since the last trip or before the next. But with only the facts reported, it is difficult to see how the railroad's failure, on former occasions, to object to keeping the trunks more than a reasonable time, can be construed as a consent to be responsible as common carrier rather than as warehouseman or gratuitous bailee.

**CHOSSES IN ACTION — MANNER AND EFFECT OF ASSIGNMENT — PARTIAL ASSIGNMENT OF DEBT.** — A assigned to her attorney B, such portion of a debt

due her from C, as should be sufficient to satisfy B's bill of costs against A. B brought an action at law against C for the amount of such costs. *Held*, that he can recover. *Skipper v. Holloway*, 26 T. L. R. 82 (Eng., K. B. D., Nov. 13, 1909).

Although choses in action were theoretically not assignable at common law, they could in practice be transferred, since a complete assignment for value carried with it an irrevocable power of attorney by which the assignee might sue at law in the name of the assignor. *Welch v. Mandeville*, 1 Wheat. (U. S.) 233. See *James v. Newton*, 142 Mass. 366, 371. But an assignment of only a portion of a chose in action created simply an equitable right against the proceeds, and did not include the right to sue in the name of the assignor. It was considered both inequitable and illogical to impose several obligations on the debtor in place of the one which he had originally assumed. *Farlie v. Denton*, 8 B. & C. 395; *Mandeville v. Welch*, 5 Wheat. (U. S.) 277. The English Judicature Act of 1873 makes "any absolute assignment, not purporting to be by way of charge only," effectual at law. The act was a radical change of procedure, but whether it was intended to alter the substantive rule respecting partial assignments is at least questionable. See *Durham Bros. v. Robertson*, [1898] 1 Q. B. 765. The assignment in the present instance was not only partial but indefinite, to cover all sums which the plaintiff should be called on to advance. On this ground at least, the case seems clearly opposed to authority. *Jones v. Humphreys*, [1902] 1 K. B. 10; *Mercantile Bank v. Evans*, [1899] 2 Q. B. 613.

CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE—BENEFICIARY BARRED FROM RECOVERY FOR DEATH BY WRONGFUL ACT.—The plaintiff, father of the deceased, sued under a statute permitting the administrator to recover for death caused by wrongful act. As next of kin he would have been sole distributee. His negligence directly contributed to the death. *Held*, that the plaintiff cannot recover. *Scherer v. Schlager*, 122 N. W. 1000 (N. Dak.). See NOTES, p. 299.

CORPORATIONS — CORPORATIONS DE FACTO — AS CONDUIT OF TITLE.—Shares of the defendant were assigned to a certain bank. Thereafter, the bank's charter expired by limitation and proceedings were taken to extend it. Later, the bank assigned the shares to the plaintiff. It was objected that, as the law under which the bank attempted to extend its charter had no application to banks, it was not a corporation and the assignment to the plaintiff was of no effect. *Held*, that the court will not inquire into the validity of the bank's incorporation. *Campbell v. Mutual Loan, Homestead & Building Association*, 74 Atl. 144 (N. J. Ct. Ch.).

It is very generally laid down that the existence of a valid law under which there might have been incorporation is essential for the application of the doctrine of *de facto* corporations. *Gillette v. Aurora Rys. Co.*, 228 Ill. 261. See 1 THOMPSON, CORPORATIONS, 2 ed., § 230. Nevertheless, collateral attack is sometimes denied, even in the absence of such a law, when the elements of estoppel are present. *West Missouri Co. v. Kansas City Co.*, 161 Mo. 595. Conversely, although there may be no basis whatever for estoppel, collateral attack is sometimes denied, if such a law is present. *Haas v. Bank of Commerce*, 41 Neb. 754. Under such circumstances, where the question is one of title gained from an alleged corporation, the court will not inquire into the validity of incorporation. *Society Perun v. Cleveland*, 43 Oh. St. 481. But where there is neither a valid law nor basis for estoppel, the doctrine forbidding collateral attack upon *de facto* corporations has been refused, even though the only question is of chain of title. *Bradley v. Reppell*, 133 Mo. 545. Yet the desirability of free circulation of title to land, choses in action, and title generally is a strong argument in favor of denying collateral attack under the circumstances last stated, and the principal case therefore seems sound. See 21 HARV. L. REV. 305, 319.



## CORPORATIONS — DIRECTORS AND OTHER OFFICERS — TRUST FUND THEORY.

— The directors of the A corporation, without giving notice to creditors, transferred all the corporate assets to the B corporation, which contracted to pay the debts of the A corporation. Later, the plaintiff recovered a judgment against the A corporation and, execution being returned unsatisfied, brought suit against the directors. *Held*, that the directors are liable. *Darcy v. Brooklyn & New York Ferry Co.*, 89 N. E. 461 (N. Y.).

Although a statute controlled the principal case, it was not regarded as necessary to the decision. See *Darcy v. Brooklyn & New York Ferry Co.*, 127 N. Y. App. D. 167. The result is reached on the American theory that the corporate assets are a trust fund for the benefit of creditors. This doctrine, formerly widely accepted in this country, has been rejected in many jurisdictions and is generally adversely criticized by legal writers. See *Hollins v. Brierfield Coal Co.*, 150 U. S. 371; THOMPSON, CORPORATIONS, 2 ed., § 3418. But even where this theory is renounced, creditors are allowed to assert a claim to corporate assets which have been distributed among the shareholders or otherwise conveyed away without value given to the corporation, on the ground that this constitutes a fraudulent conveyance. *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174. And it would seem that directors, who have directly caused such a fraudulent conveyance without making proper provision for creditors, should be held responsible to the parties prejudiced thereby. Nor should the fact that the vendee has contracted to assume the debts protect the directors, as they have no right to force the creditors into a novation.

## CORPORATIONS — DUTIES OF DIRECTORS — NEGLIGENCE RESULTING FROM AB-

SENCE UPON VACATIONS. — The defendants were directors of a trust company whose by-laws required monthly directors' meetings. A meeting was omitted because of the absence of several directors upon vacations. Losses resulted to the trust company which would have been prevented had the directors met and exercised proper supervision over certain loans. *Held*, that the directors are accountable to the trust company for such losses. *Kavanaugh v. Commonwealth Trust Co.*, 118 N. Y. Supp. 758 (Sup. Ct.).

The precise amount of care which is required of a director is hard to define. Each case must be considered separately upon its particular circumstances. *Briggs v. Spaulding*, 141 U. S. 132, 147. Two lines of cases, however, are clearly distinguishable. The one sets as a test the care which a man ordinarily takes of his own private affairs. *Hun v. Cary*, 82 N. Y. 65; *Ackerman v. Halsey*, 37 N. J. Eq. 356. The other only holds directors to liability where they have substantially acted in bad faith. *Sventzel v. Penn Bank*, 147 Pa. St. 140; *Briggs v. Spaulding*, *supra*. The reason suggested for the more lenient view is that men of wealth and reputation will not undertake the gratuitous duties of a director, if they are likely to find themselves subjected unwittingly to enormous liabilities. *Spering's Appeal*, 71 Pa. St. 11, 21. The answer obviously is that the only purpose which can be served by directors who are not conversant with the affairs of the business and who do not devote their attention to supervising the administrative officers, is to deceive the investing public. *Gibbons v. Anderson*, 80 Fed. 345, 350. The present decision is likely to have a salutary influence upon directors who are inclined to regard their duties as merely perfunctory.

## COVENANTS RUNNING WITH THE LAND — ASSIGNEE OF GRANTEE IN FEE

BOUND BY COVENANT TO BUILD AND MAINTAIN. — The plaintiff conveyed land to a railroad in fee, in consideration of the latter's covenant to build and maintain a station on the land conveyed. *Held*, that the grantee of the railroad is liable for a breach of the covenant. *Louisville, H. & St. L. Ry. Co. v. Baskett*, 121 S. W. 957 (Ky.). See NOTES, p. 298.

CRIMINAL LAW — JURISDICTION — LOCALITY OF PUBLICATION OF LIBEL. — An alleged criminal libel was printed in the defendants' newspaper at Indianapolis,

and several copies of the paper were sent by mail to subscribers in Washington, D. C. *Held*, that since the act of publication was in Indiana only, the District of Columbia has no jurisdiction over the offense. *United States v. Smith*, 173 Fed. 227 (Dist. Ct., Ind.).

The law makes libel a criminal offense because the dissemination of defamatory matter tends to disturb the public peace. See *State v. Lehre*, 4 Hall's L. J. (S. C.) 48, 53. Accordingly, it has been held that every publication is a distinct offense. *The King v. Carlisle*, 1 Chit. 451. In holding that the act of publishing was not committed where the papers were received, the court in the principal case ignores a long line of decisions. *Rex v. Watson*, 1 Campb. 215; *Com. v. Blanding*, 3 Pick. (Mass.) 304. See *Trial of the Seven Bishops*, 12 Cobbett's St. Tr. 183, 333. The defendants' own physical act was completed when the papers were mailed, but the machinery thus set in motion continued to act until they were received; and if the analogy of the law of battery and homicide is followed, the crime must be held to have been committed where the act took effect. See *Robbins v. State*, 8 Oh. St. 131; *Simpson v. State*, 92 Ga. 41. Some cases, however, hold that an indictment can be brought either where the libel is mailed or where it is received, on the ground that a misdemeanor can be tried where any part thereof is committed. See *Rex v. Burdett*, 4 B. & Ald. 95, 170. But even this view would be equally fatal to the decision in the principal case.

EQUITY — PRIORITY OF EQUITIES — EFFECT OF ASSIGNMENT OF CHOSE IN ACTION. — By fraud X induced a mortgagee to assign to him the mortgage debt. X then assigned it for value to Y, who was ignorant of the fraud. *Held*, that Y takes subject to the equity of the defrauded mortgagee. *Hubbell, Hall & Randall Co. v. Brickman*, 64 N. Y. Misc. 370 (Sup. Ct.).

The established rule in New York is that in the absence of estoppel an assignee takes subject to all equities against his assignor in favor of third parties. See *Central Trust Co. v. West India Co.*, 169 N. Y. 314, 324. But this view is opposed to the weight of authority. See AMES, CASES ON TRUSTS, 310. The usual explanation of the majority rule is that a defrauded assignor by giving to his assignee an apparently good authority to collect is estopped to deny it. *Putnam v. Clark*, 29 N. J. Eq. 412. It is more satisfactory to rest the rule upon the broad principle that equity will not deprive a *bonâ fide* purchaser of a legal interest. See 1 HARV. L. REV. 7. It is erroneous to assume that an assignee's rights are merely equitable; there are legal interests less than title which equity will respect. Thus when an attempted transfer of real property is not completed, but the defect may be cured without calling upon the transferor to do any act, the rights of a *bonâ fide* transferee are superior to existing equities. *Duff v. Randall*, 116 Cal. 226; *Hume v. Dixon*, 37 Oh. St. 66. The assignee of a chose in action gets a legal right to perfect his title to the money, unmolested and without calling upon the assignor for aid. This right should prevail over latent equities. Cf. *Dodds v. Hills*, 2 H. & M. 424; *Ortigosa v. Brown*, 47 L. J. Ch. 168, 172.

EQUITY — SPECIFIC PERFORMANCE — DOCTRINE OF MUTUALITY. — An oral agreement was made to lease for eight years certain mining lots in return for a promise to pay royalties on the ore mined and a covenant to work the mines continuously. The plaintiff was given possession, spent a considerable sum on improvements, and worked the mines for over three years. To a bill for specific performance of the lease the defendant raised the objection of lack of mutuality. *Held*, that the defendant must specifically perform his part of the agreement. *Zelleken v. Lynch*, 104 Pac. 653 (Kan.). See NOTES, p. 294.

EVIDENCE — TESTIMONY GIVEN AT FORMER TRIAL — ABSENCE OF WITNESS FROM JURISDICTION IN CRIMINAL CASE. — On an appeal by the prisoner after his conviction in the police court, the prosecution offered to introduce evidence of testimony which had been given in the former trial by a witness who had sub-



sequently removed from the state. *Held*, that such evidence is inadmissible in criminal cases. *Holifield v. City of Laurel*, 50 So. 488 (Miss.).

In civil cases it is almost universally held that evidence of testimony given in a former trial of the same issue between the same parties is admissible if the witness is absent from the jurisdiction. *Wheeler v. Jenison*, 120 Mich. 422. Upon the question of applying this rule in criminal cases, however, the courts are not in agreement. There seems to be no sufficient reason for a distinction between the two classes of cases. *People v. Devine*, 46 Cal. 45; *Vaughan v. State*, 58 Ark. 353, 370. *Contra*, *U. S. v. Angell*, 11 Fed. 34; *People v. Newman*, 5 Hill (N. Y.) 295. The introduction of the evidence works no greater hardship on the state or the prisoner, than on a party to a civil action. In both cases there has been the all-important opportunity for cross-examination. The constitutional provision that an accused person shall be confronted by the opposing witnesses is very generally understood to be merely declaratory of the common law, and so subject to all the exceptions to the hearsay rule. See *State v. McO'Blenis*, 24 Mo. 402. Thus, in the state in which the principal case was decided, the death of a witness will make evidence of his testimony admissible in a subsequent trial of the same case. *Lipscomb v. State*, 76 Miss. 223.

**INSURANCE — CONSTRUCTION OF PARTICULAR WORDS AND PHRASES IN STANDARD FORMS — "THE INSURED" TO FURNISH PROOFS OF LOSS.** — A mortgagor took out insurance payable to the mortgagee as his interest might appear. The policy provided that the mortgagee's interest should not be invalidated by any act or neglect of the mortgagor, and that "the insured" should furnish proofs of loss within a certain time. *Held*, that recovery by the mortgagee is not barred by the lack of proofs within the stipulated time. *Ohio-German Insurance Co. v. Krumm*, 12 Oh. Cir. Ct. R. N. S. 364.

In the absence of any provision against invalidation of the policy by neglect of the mortgagor, by the weight of authority, the mortgagee could not recover. *Shapiro v. Western Home Insurance Co.*, 51 Minn. 239. The "union mortgage clause" protects the mortgagee from the mortgagor's neglect, but not from his own act or neglect. *Genesee, etc. Association v. U. S. Fire Insurance Co.*, 16 N. Y. App. Div. 587. Whether failure to furnish proofs was his own neglect depends on whether the term "the insured" applies to the mortgagor alone, or also to the mortgagee. The cases and text-books frequently suggest that the mortgage clause makes a separate collateral contract of insurance between the underwriter and the mortgagee. See *Queen Insurance Co. v. Dearborn, etc., Association*, 175 Ill. 115; 1 CLEMENT, FIRE INSURANCE, 33. If such a view is correct, the mortgagee is as truly "the insured" as the mortgagor. But it is believed that the language referred to is inaccurate, and that the mortgagee is not a promisee in the insurance contract, but merely a beneficial third party. Hence "the insured" refers only to the mortgagor and the principal case is correct.

**INSURANCE — MUTUAL BENEFIT INSURANCE — DESIGNATION OF ILLEGAL BENEFICIARY.** — A person insured in a mutual benefit society designated an illegal beneficiary. After the insured's death, the administratrix claimed the amount of the certificate. *Held*, that she is entitled to it. *Mullen v. Woodmen of the World*, 122 N. W. 903 (Ia.).

The right of a person insured in a mutual benefit society to designate a beneficiary is a mere naked power of appointment. *Pilcher v. Puckett*, 77 Kan. 284. This power is not property. *Maryland Mut. Ben. Soc., etc. v. Clendinen*, 44 Md. 429. If there is no designation, no one can recover as beneficiary. *Eastman v. Provident Mut. Relief Assn.*, 62 N. H. 555. And the appointment of an illegal beneficiary is equivalent to a total failure to appoint. *Rindge v. N. E. Mut. Aid Soc.*, 146 Mass. 286. Yet the principal case is supported by several decisions. In some, the mistake is made of treating the power of the assured to appoint a beneficiary, as a right to the benefit. *Newman v. The Covenant Mut. Ins. Assn.*,

76 Ia. 56. In others, there is a confusion of ordinary life insurance decisions with mutual benefit insurance cases. *Schmidt v. The Northern Life Ass'n*, 112 Ia. 41. And in still others, the society is called a trustee for the insured's heirs, because of the statements in its constitution and by-laws as to the purpose of the society to protect heirs of members. *The Supreme Lodge, etc. v. Menkhause*, 209 Ill. 277. But these statements are merely preliminary, and the only undertaking is to pay to some designated person. The result in the principal case, however, is highly desirable, and statutes or by-laws commonly provide for such a contingency.

**MORTGAGES — MORTGAGOR'S RIGHT TO AN ACCOUNT FOR RENTS AND PROFITS — NATURE OF THE RIGHT.** — A mortgagee filed a bill for foreclosure. The mortgagor pleaded that the rents and profits received by the mortgagee while in possession were sufficient to satisfy the debt, and asked for an accounting. *Held*, that the court may strike a balance between the amount chargeable to the mortgagee and the mortgage debt, and give judgment of foreclosure accordingly. *Hoye v. Bridgewater*, 118 N. Y. Supp. 951 (Sup. Ct., App. Div.). See NOTES, p. 301.

**MUNICIPAL CORPORATIONS — GOVERNMENTAL POWERS AND FUNCTIONS — INVESTIGATION OF MUNICIPAL PROBLEMS.** — The common council of the city of Detroit placed the sum of five thousand dollars at the disposal of the mayor, to be used in investigating the street railway problem of the city presented by the expiration of certain franchises. An injunction was sought to prevent the expenditure of this money. *Held*, that a writ of mandamus will be issued to compel the lower court to issue such injunction. *Attorney General ex rel. Maguire v. Murphy*, 122 N. W. 260 (Mich.). See NOTES, p. 293.

**MUNICIPAL CORPORATIONS — OFFICERS AND AGENTS — EFFECT OF RE-ELECTION AFTER OUSTER.** — The charter of New York City provides that the president of a borough, an officer chosen by popular vote, may be removed for cause by the governor, and that a vacancy shall be filled by a majority of the aldermen from the borough. The defendant, having been so removed, was immediately selected by the aldermen for the remainder of his original term. *Held*, that he is not entitled to office. *People v. Ahearn*, 42 N. Y. L. J. 761 (N. Y. Ct. App., October, 1909).

This affirms an interlocutory judgment of the Appellate Division reversing a judgment of the Supreme Court. For a criticism of a decision precisely similar to that in the principal case, see 20 HARV. L. REV. 316; 22 HARV. L. REV. 540.

**PAROL EVIDENCE RULE — SUBSTANTIVE LAW EXPRESSED IN TERMS OF EVIDENCE — CONTRACTS: WHETHER LEGAL IMPORT OF SAME IS WITHIN PROTECTION OF THE RULE.** — On September 1, 1905, the plaintiff wrote to the defendant offering an option for the continuation of a contract between them for one year, from July 26, 1906. The defendant acknowledged the receipt of the offer without accepting it. On July 26, 1906, he sent an acceptance, but the plaintiff refused to abide by the terms of the offer. Evidence offered by the defendant of an oral agreement that the offer was to stay open till July 26, 1906, was excluded. The defendant appealed. *Held*, that the evidence was rightly excluded. *Standard Box Co. v. Mutual Biscuit Co.*, 103 Pac. 938 (Cal.). See NOTES, p. 302.

**POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — REQUIREMENT OF BANK DEPOSITORS' GUARANTY FUND.** — A statute provided that the business of banking be restricted to corporations, and required that contributions be made annually to a fund for the protection of the depositors of insolvent banks. *Held*, that the statute is an unreasonable exercise of the police power. *First State Bank of Holstein v. Shallenberger*, 72 Fed. 999 (Circ. Ct., D. Neb.). See NOTES, p. 292.



**RULE AGAINST PERPETUITIES — RULE AGAINST POSSIBILITY ON POSSIBILITY EXTENDED TO EQUITABLE ESTATES.** — The result of a power of appointment, when read into the original settlement, was to give an equitable estate to an unborn person for life with a remainder to his unborn child. *Held*, that the appointment is invalid. *In re Nash*, 26 T. L. R. 57 (Eng. Ct. App., Nov. 2, 1909).

In affirming the decision of the Chancery Division, the court confines the doctrine of a possibility on a possibility to such a limitation as was here involved. For a discussion of the decision in the lower court, see 23 HARV. L. REV. 231.

**RULE IN SHELLEY'S CASE — DISTINCTION BETWEEN DEEDS AND WILLS.** — A testator devised land to A for life, remainder to the heirs of A. The will contained a provision that A should have no power to convey for a longer period than his life. *Held*, that the rule in Shelley's Case is inapplicable. *Westcott v. Meeker*, 122 N. W. 964 (Ia.).

In a previous case the Iowa court held that the rule in Shelley's Case was applicable to a conveyance by deed and declared that it constituted a part of the common law of the state. *Doyle v. Andis*, 127 Ia. 36. The principal case is clearly irreconcilable with this decision. Two questions arise in applying the rule in Shelley's Case: First, whether the donees in remainder are to take as purchasers or as heirs of the life tenant; secondly, whether the rule is applicable. See *Shapley v. Diehl*, 203 Pa. St. 566. It is true that the intention of the testator may give to words in a will a meaning which they could not have in a deed. *McIlhinny v. McIlhinny*, 137 Ind. 411. But an express declaration that the prior estate shall be only for life does not justify the construction that the remaindermen take as purchasers. *Roe v. Bedford*, 4 M. & S. 362. And once it is determined that the remaindermen are to take as the heirs of the life tenant, then the rule applies irrespective of the testator's intention. *Van Gruten v. Foxwell*, [1897] A. C. 658. See 11 HARV. L. REV. 418; 12 *ibid.* 64. And on this point there is no basis for a distinction between wills and deeds. *In re White & Hindle's Contract*, 7 Ch. D. 201.

**SALVAGE — SERVICES RENDERED TO SHIP IN DRY DOCK.** — The libellants extinguished a fire on a vessel in dry dock. *Held*, that they are entitled to salvage. *The Steamship Jefferson*, 215 U. S. 130.

This decision reverses that of the lower court discussed in 21 HARV. L. REV. 634.

**STATES — EFFECT OF GRANT OF CONCURRENT JURISDICTION OVER BOUNDARY RIVERS.** — A federal court sitting within the State of Washington issued a restraining order against an unlawful obstruction on the Columbia River. A decision of the United States Supreme Court thereafter determined that this obstruction was in Oregon. The defendant then moved that the suit be dismissed for want of jurisdiction. *Held*, that the motion to dismiss should be denied. *Columbia River Packers' Association v. M'Gowan*, 172 Fed. 991 (Circ. Ct., W. D. Wash.).

For a discussion of the principles involved, see 22 HARV. L. REV. 599.

**VOLUNTARY ASSOCIATIONS — AUTHORITY OF EXECUTIVE COMMITTEE TO BORROW MONEY.** — The National Executive Committee of the Socialist Labor Party, an unincorporated voluntary association, borrowed money of the plaintiff, and its action was subsequently approved by the national convention of the party. Suit was brought against the defendant, as treasurer of the association. *Held*, that the plaintiff cannot recover. *Siff v. Forbes*, 42 N. Y. L. J. 1005 (N. Y. App. Div., Nov. 1909).

Section 1919 of the New York Code of Civil Procedure allows suit against the president or treasurer of an association only when all the members are jointly or severally liable. It therefore merely simplifies the remedy and does not increase

the plaintiff's right. *McCabe v. Goodfellow*, 133 N. Y. 89. Had the association been for purposes of business or profit, the members would have been liable as partners. *McKenney v. Bowie*, 94 Me. 397. But associations for social or political purposes are not partnerships. *Lewis v. Tilton*, 64 Ia. 220; *Fleming v. Hector*, 2 M. & W. 172. The liability of the members, therefore, depends on the laws of agency. *Ash v. Guie*, 97 Pa. St. 493. It is an established rule of law that an agent of a non-commercial business has not implied authority to borrow money. *Temple v. Pomroy*, 70 Mass. 128. It follows, naturally, that an agent of a voluntary association for other than business purposes has not such an implied authority. *McCabe v. Goodfellow*, *supra*. The national convention for the same reason had not authority to borrow. Therefore it had not authority to ratify. *Crum's Appeal*, 66 Pa. St. 474. Furthermore, since the members had no opportunity to repudiate the committee's action, their subsequent silence was not such an acquiescence as amounts to a ratification. See *Rudolph v. Southern Beneficial League*, 23 Abb. N. C. (N. Y.) 199, 208.

WATERS AND WATERCOURSES — NATURAL LAKES AND PONDS — DIVISION OF LAKE-BED AMONG ABUTTING OWNERS. — A and B owned adjoining pieces of land abutting on a lake. *Held*, that each owns the land under water in front of his premises to the "thread of the lake," which, where there is no outlet or inlet, passes through the centre of the lake along its longest diameter. *Calkins v. Hart*, 118 N. Y. Supp. 1049 (Sup. Ct.).

No rule, universally applicable, for the division of the beds of lakes has ever been devised. One suggestion is that lines should be drawn from the geographical centre of the lake to the outer boundaries of the lands of abutting owners. *Scheifert v. Briegel*, 90 Minn. 125. But this method fails when applied to a lake of irregular shape. The principal case adopts the rule which is applied to non-navigable rivers, saying that deep bays should be treated in the same way as tributary streams. See 17 HARV. L. REV. 410. By this rule, if the lake happened to be nearly square, the owners on the short sides would get little or nothing. Owing to the fact that the shifting thread of a river remains the boundary between the opposite owners, any division of its bed can be only temporary. *Welles v. Bailey*, 55 Conn. 292. But there seems to be no reason why a lake-bed cannot be permanently divided and the lake still be retained as a boundary. The principle should be to give each abutting owner a share proportionate to the length of his shore line. See *Deerfield v. Arms*, 17 Pick. (Mass.) 41. But probably something in the nature of a partition proceeding would be necessary in each individual case. See *Jones v. Lee*, 77 Mich. 35.

WILLS — CONSTRUCTION — RULE IN WILD'S CASE. — A will left leasehold and real estate to the testator's wife for life and then to his three children, in certain shares, "and to the child or children of the three said children," with further provision for the contingency of any of the three children dying without issue. The first grandchild was born after the testator's death. *Held*, that the rule in Wild's Case does not apply, and that the share of each child is subject on his death to an executory limitation over to his children. *Re Jones*; *Lewis v. Lewis*, 128 L. T. 56 (Eng. Ch. D., Nov. 11, 1909).

In wills, the word "children" is ordinarily one of purchase. But by the rule in Wild's Case, a devise to A and his children, when A has no children, gives A an estate tail. *Clifford v. Koe*, 5 App. Cas. 447; *Parkman v. Boudoin*, 1 Sumn. (U. S.) 359. For this construction, the date when there must be no children is that of making the will, not of the testator's death. *Seale v. Barter*, 2 B. & P. 485. But see 2 JARMAN, WILLS, 1242. The original object of the rule was to give effect to the evident intention of the testator to provide for unborn children, who, if not in being at the time of distribution, would otherwise be barred. See *Wild's Case*, 6 Coke 17. The formula has been followed, however, even where a statute makes all estates tail estates in fee simple. *Silliman v. Whitaker*, 119



N. C. 89. But it is not applied to bequests. *Audsley v. Horn*, 1 De G. F. & J. 226. But see *Heron v. Stokes*, 1 C. & L. 270. As the rule is one of construction only, it does not apply when the face of the will indicates, as in the principal case, an intention which it would defeat. *Grieve v. Grieve*, L. R. 4 Eq. 180; *Wilmot v. Berterton*, 76 L. T. N. S. 415. And the eminently sensible result here is directly supported by authority, including the actual decision in *Wild's Case* itself. *Wild's Case*, *supra*; *Audsley v. Horn*, *supra*.

## BOOK REVIEWS.

THE LAWS OF ENGLAND. By the Right Honorable the Earl of Halsbury and other lawyers. In about 20 volumes. London: Butterworth and Company; Philadelphia: Cromarty Law Book Company.

Vol. III. Bills of Sale to Carriage by Sea. 1908. pp. cxxxi, 578, 55.

Vol. IV. Carriers to Commutation of Tithes. 1908. pp. cxlviii, 614, 49.

Vol. VI. Compulsory Purchase of Land to Constitutional Law (part). 1909. pp. cxxxi, 499, 39.

Vol. VII. Constitutional Law (conclusion) to Coparcener. 1909. pp. clxvi, 544, 37.

Vol. VIII. Copyhold to County Courts. 1909. pp. cxxviii, 693, 42.

The publication of Vol. V has been delayed. The whole volume is devoted to Company Law, and the passage of the Companies (Consolidation) Act of 1908 rendered a delay advisable.

In reviewing the first two volumes of this great work it was said: "If the excellence of these two volumes is maintained in the subsequent volumes, the complete work will be a solid contribution to the Law of England, and of great practical utility to the lawyer and the judge." These five volumes, at least, fully maintain the excellent qualities of the first two, and give promise of good work to come.

Vol. III contains articles on Bills of Sale (78 pages), Bonds (26 pages), Boundaries, Fences and Party-Walls (43 pages), Building Contracts, Engineers and Architects (154 pages), Building Societies (80 pages), Burial and Cremation (175 pages).

Vol. IV includes articles on the whole more interesting to an American lawyer: Carriers (99 pages), Charities (256 pages), Choses in Action (44 pages), Clubs (33 pages), and Commons and Rights of Common (163 pages).

In Vol. VI are articles on Compulsory Purchase of Land and Compensation (175 pages), Conflict of Laws (131 pages), and the first part of the article on Constitutional Law (190 pages).

In Vol. VII the article on Constitutional Law is completed (277 pages, making in all 467 pages devoted to this subject), and the other articles in the volume are Contempt of Court, Attachment and Committal (46 pages), and Contract (214 pages).

Vol. VIII contains Copyholds (134 pages), Copyright and Literary Property (73 pages), Coroners (88 pages), Corporations (102 pages), and County Courts (288 pages). These articles, like those in the first two volumes, are written by men who are masters of their subjects, usually by lawyers who have a large share in administering the law about which they write. This gives the work a distinct air of authority.

Several of the articles are of special interest and value to American lawyers. The article on Carriers states clearly and very concisely the law of carriers of goods and passengers. A large part of it is devoted to the statutory regulations of carriers; but the excellent discussion of the Railway and Canal Traffic Act is of

great importance for the assistance it gives in interpreting our Interstate Commerce acts. The article on Conflict of Laws is an adequate and illuminating treatment of the topic, based (as every English treatment of the subject must be) on Professor Dicey's remarkable book, and adopting his conclusions and even his form of statement on such controverted points, for instance, as the law governing the essential validity of contracts. The article on Contempt contains an excellent statement of the law of criminal contempts, and (from our point of view) a rather inadequate treatment of contempt in violating an order of court; but it throws little light on the vexed problem of procedure for the punishment of contempts. The more settled practice of the English courts has enabled them to deal satisfactorily with a matter which to us is full of danger. The article on Contracts is a sound and adequate treatment of the general principles, and includes a treatment of Quasi-contract under the title of "constructive contracts." In the article "Corporations" it is interesting to note that Companies are included, thus following the view adopted in the American cases; and that corporations *de facto* appear to play no part in unsettling the theories of English lawyers, though the article "Companies" may deal with them.

The undertaking has covered, at the end of the eighth volume, a portion of the alphabet which in other similar works has occupied one quarter of the whole. It would seem, therefore, that the whole work is likely to extend to about thirty volumes. If the others are as well done as these, the projectors of the work will certainly deserve the gratitude of the legal profession.

J. H. B.

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EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW. Two courses of lectures by F. W. Maitland. Edited by A. H. Chaytor and W. J. Whittaker. Cambridge: at the University Press. 1909. pp. xvi, 412.

We are doubly indebted to Messrs. Chaytor and Whittaker, not only for unexpected access to another work of a great legal historian, but also for an interesting sidelight thrown on his ability to present a body of living law. We in this country have perhaps been accustomed to think of Professor Maitland too much as an expositor of the development of the law in the past, rather than of its present structure. This book consists of twenty-one lectures on equity and seven lectures on the forms of action at common law, delivered to students at Cambridge University, and fully written out by him some years ago, the task of the editors being to incorporate the author's later marginal notes and to collect in footnotes some of the more important cases since his death. The first three lectures on equity deal with its origin and history: then follow five lectures on the creation of trusts, express, implied, resulting, and constructive; then four more on the nature of equitable estates and the present relations of equity and the common law; while the last part of the course deals with satisfaction and ademption, administration, conversion, election, specific performance, injunctions, and mortgages.

While there is much of interest to which to call attention in Professor Maitland's historical treatment of equity, we may specially refer the reader to the origin of uses, pp. 23-33. Why was there not a remedy in contract against the disloyal feoffee, he asks. One answer he finds in the more efficient remedy of the Chancellor on behalf of the *cestui que use* against the feoffee. That remedy was already in the field when the courts of common law in the fifteenth century evolved the action of assumpsit. Professor Ames has pointed out that the remedy by covenant in the few charters of feoffment in which a covenant appeared may fairly be said to have counted for nothing. 21 HARV. L. REV. 264. For this, and for other reasons (pp. 30, 31), the sole remedy of the beneficiary originated and has always remained in Chancery by subpœna. The personal nature of the right in equity is emphasized throughout. Equity does not claim that the *cestui* is the owner of the *res* and thus conflict with the law's view of the trustee as owner. It does not say to



the law, "Your rule is an absurd, an obsolete one." On the contrary it says, "Yes, of course that is so, but it is not the whole truth," for, it goes on, it is true that your friend is the owner but he is bound by one of those obligations known as trusts (pp. 17, 19, 112, 130). The method of teaching the modern doctrines of equity is from a practical point of view. Many of the cases cited have arisen since 1900, and everywhere the student's attention is called to the bearing of the statutory changes.

"The forms of action we have buried, but they rule us from their graves." In the seven lectures at the end of the book the author shows how the classification of the forms of action have grown and died to make way for a rational classification of causes of action. His theme calls largely for historical consideration, which is delightfully executed. With the present tense he leads us back into the past. Brief treatment and a student audience make necessary wider and more dogmatic generalizations than we find in the *History of English Law*. Not many qualifications can find a place here; yet the reader is constantly warned by phrases such as "here we hear a hint of," or, "we seem to catch the thought," of the true weight of statements. The style is charming, and the points clearly made. A line or two at the end of a discussion summarizes it in a well-turned phrase. For instance, in his consideration of the distinction between the writ of right and the assize of novel disseisin he ends by saying of the successful plaintiff in the proprietary action, "the court will help him to his own though it has punished him for helping himself" (p. 322). Indeed an admirable method of approaching the greater work of the author and Sir Frederick Pollock is to read first these lectures.

In general the treatment of all the subjects is brief. Twenty-one lectures is a narrow space in which to deal even cursorily with trusts, specific performance, and injunctions. Many of the cases have complicated facts, difficult to explain to students who meet them for the first time in the class room. Yet we do not need the preface to assure us how Professor Maitland commended himself to his pupils. Of this the single-mindedness of the editors and their associates in their labor of love, carefully and judiciously performed, is sufficient proof. J. W.

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A TREATISE ON THE RULES AGAINST PERPETUITIES, RESTRAINTS ON ALIENATION AND RESTRAINTS ON ENJOYMENT IN PENNSYLVANIA; with a particular discussion of Spendthrift Trusts, Married Women's Trusts, Accumulations, and Gifts to Charities. By Roland R. Foulke. Philadelphia: George T. Bisel Company. 1909. pp. xxxii, 548.

The decisions of a single state upon a particular topic, and more especially the Rule against Perpetuities, form but a fragmentary and imperfect body of law. Litigation tends to pursue the course marked out by previous decisions, exaggerating the importance of principles established and ignoring the bearing of principles which have not yet received the sanction of local precedent. To correct this tendency requires a return to first principles, an orientation from the vantage ground of the common law. In this work, the author, unlike most writers of textbooks on local law, has not merely transcribed the decisions which he has found; he has tested them by the standards of the common law, and filled in the principles not yet ruled, so as to exhibit the decided cases in their true perspective. His criticisms are supported by elaborate and skilful arguments, without, however, leaving the reader in doubt as to what the law actually is. Altogether the book is a scholarly and accurate analysis of the decisions in a branch of the law in which more than ordinary confusion prevails. It presents a thorough contrast to the hastily prepared commercial products being daily marketed as law books.

The author has performed for the legal profession of Pennsylvania a service such as was rendered by Mr. Kales in his *Conditional and Future Interests*, and *Illegal Conditions and Restraints in Illinois*. Like Mr. Kales, he justly acknowl-

edges his "indebtedness to the masterly treatises of Mr. Gray." His discussion and criticism of the decisions follow Professor Gray in the main very closely, but are in much greater detail than is possible in a general work, in which the value of the individual case is less. The authorities have been re-examined on many points on which the law of Pennsylvania is frequently stated to be peculiar; and the author's conclusions do not always square with commonly accepted notions. He asserts that no authority exists for the statement that the Statute of Uses executes a use upon a use, and that it is doubtful whether it applies to personal property. He also considers an open question whether property appointed under a general power to a volunteer is assets for the payment of the appointor's debts. His comments on the terminology of the decisions, while in the interest of greater exactness in the law, are at times somewhat hypercritical. He condemns the application of the term "base fee" to the interest acquired by the exercise of the right of eminent domain. But this term was introduced as an analogy only. The interest, of course, is not an *estate* created by voluntary act of the owner, but is a special statutory interest created by a power of sovereignty paramount to rights of property. It is a group of rights not yet exhaustively enumerated, which does not exactly coincide with any of the estates or interests in the scheme of the common law.

The phrase "restraints on enjoyment," employed in the title has the appearance of novelty. The author divides restraints on alienation into three classes: restraints on voluntary alienation, prohibiting the beneficiary from aliening his interest; restraints on involuntary alienation, exempting it from liability for his debts; restraints on enjoyment, postponing his right to demand a conveyance of the principal beyond the period of his majority. And the author, in the arrangement of his book, enforces this distinction between restraints on alienation and restraints on enjoyment, by inserting between them his treatment of the Rule against Perpetuities. While this threefold distinction does furnish a convenient classification, it is believed that it does not justify substantial differences in the law. Each of these three restraints is necessary to accomplish the single purpose of the testator to prevent the beneficiary from squandering the principal of his bounty; and the validity of each is predicated upon the asserted right of an owner, to do as he will with his own, to give subject to such restrictions as he chooses. Unless a uniform rule be adopted, holding these restraints either all legal or all illegal, much confusion in the law would result. If the prohibition against voluntary alienation alone be void, the *cestui* can sell the property and waste the purchase money. The other two restraints might conceivably continue valid and follow the interest into the hands of his vendee, as the author suggests (§ 486); but such restraints are obviously intended to be personal, to guard against the improvidence of a particular beneficiary. If the prohibition against involuntary alienation be void, the *cestui* can incur debts in payment of which his interest can be sold on execution. If the restraint on enjoyment be void, he can compel a conveyance of the legal title from the trustee, and with this termination of the trust would probably fall the other two restraints, as even in Pennsylvania these restraints seem to be void when attached to *legal* estates.

The author's well directed attack upon the validity of these restraints is apparently intended to clear the way for "ridding the state of the doctrine of spendthrift trusts" (§ 289). But the judicial annulment which he advocates of this accepted doctrine, would surely work havoc among titles. His argument (§ 269, n. 8), that, as the restraint *prevents* alienation, its removal would not affect titles, overlooks the common case where the *cestui's* interest, in violation of the restraint, is sought to be transferred by deed or sale on execution. Here a transfer, which had been ignored as void under existing decisions, would be validated by overruling them, and sever a chain of title previously passed as perfect.

In the second edition of Gray's *Restraints on Alienation*, published in 1895, the author raised the question whether a restraint upon alienation imposed upon



the gift of an absolute equitable interest, as distinguished from a life interest, would be held valid in Pennsylvania. Since then in a series of decisions culminating in *Spring's Estate*, 216 Pa. 529, this very restraint has been held legal, and the prayer of an adult beneficiary for a conveyance of the fee from the trustee refused, as in the leading Massachusetts case of *Clafin v. Clafin*. H. F. S.

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A TREATISE ON THE LAW OF INSOLVENT AND FAILING CORPORATIONS. By S. Walter Jones. Kansas City: Vernon Law Book Company. 1908. pp. xxv, 1011.

Mr. Jones has had the hardihood to venture into a field as yet untouched by the myriad of text-books. It is, however, a field that has been gradually expanding until its limits now are so extensive that a single text-book hardly suffices to cover the ground. Indeed, corporation law is fast becoming a vast system of intricate and complex rules, which threaten to form the major and the most important portion of our commercial law; and however much we may deplore this tendency and the evidence of it in the continual increase of the books devoted solely to matter of corporate law, we must face its development.

As is too often the case, the author has given too little space to a development of the history of the principles with which he deals and the philosophy behind them, and too much space to a mere narration of what various cases have decided. We cannot help regretting that there are so few who seem willing to follow in the footsteps of Professor Wigmore, or even to pattern their works after his admirable example. But the systematic and laborious compilation of authorities in itself makes this book a useful one to the profession. F. W. B.

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THE POWER OF EMINENT DOMAIN. By Philip Nichols. Boston: Boston Book Company. 1909. pp. xxi, 560.

This text-book is limited to a treatment of the fundamental principles of constitutional law adopted and applied by the courts in defining the proper exercise of the power of eminent domain. The author was until recently an Assistant Corporation Counsel of the city of Boston, and compiled this book during eleven years' service in the Law Department of that city. He deserves credit for attempting this concise and intensive study of the borderland lying between constitutional law and the law of eminent domain. Throughout his work, the author's purpose is to condense and to save the reader's time by a systematic statement of principles, supported by numerous case citations in footnotes. But his book is more than a digest of cases. It shows independence of judgment; as, for example, in the definition of "public use" and in the criticism of the doctrine of certain courts which allow abutters' easements in highways when the fee is in the public. E. D. B.

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THE HAGUE PEACE CONFERENCES OF 1899 AND 1907. By James Brown Scott. In two volumes. Baltimore: The Johns Hopkins Press. 1909. pp. xiv, 887; vii, 548.

In the first volume we find the individual work of the author. Mr. Scott is especially prepared to write on this subject by his experience as Technical Delegate and Expert in International Law attached to the United States delegation at the Second Peace Conference, of 1907. The touch of personal familiarity with the matter in hand which is so evident in this volume could have no other source.

The second volume is a compilation of the various diplomatic papers which

make up the material of the subject. They are printed in French and English, on opposite pages. The text of the final act of each conference is given in full, preceded by copies of the more important state papers showing the calling of the conference. Tables of the various powers adhering to each convention, and of the reservations made by each, increase the value of this volume as a book of reference.

The title of the volumes aptly expresses their character: for emphasis is laid on the conferences themselves and their work, rather than upon analytical and technical study of the various conventions and *vœux* which represent the final achievements of the conferences. The treatment is rather from the political and diplomatic point of view. The "Acts" of the conferences are shown in their making. The clash of interest, real or supposed, between small and great powers, the refusal of Germany to accede to the "project" for compulsory arbitration of enumerated difficulties, and the effect of internal affairs upon international questions are plainly shown. The addresses of von Bieberstein, Renault, Bourgeois, and others are quoted, and the reader is given to understand the difficulties which beset the delegates, and to appreciate the full value of what finally was accomplished.

This is especially true in regard to the peaceful settlement of international disputes, arbitration, and international courts. These matters are not only followed in detail in the conferences, but are discussed historically at some length. The more technical matters are similarly treated, but in less detail, and with less historical comment.

The work, in fact, is a readable and accurate history of the Conferences. The volumes are well bound and printed each with an exceptionally full index.

A. R. G.

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THE PEOPLE'S LAW or POPULAR PARTICIPATION IN LAWMAKING. A study in the Evolution of Democracy and Direct Legislation. By Charles Sumner Lobingier. New York: The Macmillan Company. 1909. pp. xxi, 429.

CASES AND OPINIONS ON INTERNATIONAL LAW, with notes containing the Views of the Text Writers, Supplementary Cases, Treaties and Statutes. Part I: Peace. By Pitt Cobbett. Third edition. London: Stevens and Haynes. 1909. pp. xxiv, 385.

WRITING FOR THE PRESS. A Manual. By Robert Luce. Fifth edition. Boston: Clipping Bureau Press. 1907. pp. 302.

THE ESSENTIAL NATURE OF LAW, or the Ethical Basis of Jurisprudence. By William S. Pattee. Chicago: Callaghan and Company. 1909. pp. xxv, 264.

THE LAW OF THE UNIVERSITIES. By James Williams. London: Butterworth and Company. 1910. pp. xviii, 151.







James Barr Ames



# HARVARD LAW REVIEW.

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VOL. XXIII.

MARCH, 1910.

No. 5.

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## JAMES BARR AMES

JAMES BARR AMES had a strong natural taste for teaching. During his last year in the Law School, 1871-72, he was tutor in French in Harvard College, and from that year to his death he never ceased to teach. In 1872-73 he was Instructor in History in the College. His whole career was at Harvard University. He received the Bachelor's degree in 1868, and the Master's degree and the degree of Bachelor of Laws in 1872, all three from Harvard, and he never taught except in Harvard University. He prepared case-books and wrote occasional articles and addresses on legal subjects; but he never gave systematic instruction anywhere but in Harvard University, and he never took a whole year of vacation in his life. He contented himself with the regular vacations of each academic year, and much of those vacations he gave to work incidental to teaching.

A year after his graduation from the Law School he was made Assistant Professor of Law, having proved his quality as a teacher by two years of service in Harvard College. His appointment as Assistant Professor was a remarkable step for the Law School and the University to take. Up to that time the University had never appointed as teacher of law a man who had not been in practice. His appointment was strongly urged by Dean Langdell on the ground that Ames had a remarkable legal mind, and was an extraordinarily successful teacher; and the Corporation and Overseers decided to take the risk for five years on Professor Langdell's and the President's testimony. The consent of the Board of Overseers could not have been obtained, if an assistant professorship had not been an office terminable in five years. The strong interest of Professor Langdell in the appointment was due to the fact that Ames had been his best pupil while he

was introducing his case system of instruction into the Law School. It soon appeared that Ames's mental gifts made him a remarkably successful teacher under the case method, which was then beginning to demonstrate its power of training young men for the best work in the legal profession. So striking was Ames's success in making the students think for themselves, and get a mastery of the new method, that Ames was promoted to be full professor one year before the end of his five years' term as assistant professor, with the cordial approval of students, professors, and governing boards.

His success as a teacher depended largely on his capacity for sympathetic appreciation of the student's frame of mind, but also on his gift for stating both sides of a legal question with perfect clearness and without indicating his own opinion. He stimulated every student to draw his own conclusions from given premises. He had himself an extraordinary memory for the facts of a case, or of a multitude of cases, and for the sources and historical development of legal principles, and he wanted his students to remember the facts of every case they studied, and to observe the development of the principles involved; but his primary object was always to make them think for themselves. The case method as he applied it taught every competent student how to use the voluminous records of legal proceedings, old and new, so as to find safe precedents, how to apply established principles to new cases, and how to bring out the weighty considerations in any case. In short, his students learned to draw sound briefs. This was a very interesting, stimulating, and effective method, and Ames followed it in the Law School with increasing success for thirty-six years. To him is largely due the success of the Langdellian method, and no one was clearer in the recognition of that fact than Professor Langdell, whose own teaching power was diminished by his very defective eyesight and a certain constitutional slowness in making a careful statement.

Ames was first appointed full Professor in 1877, at a time when no endowed and named professorship was vacant. Two years later he was transferred to the Bussey professorship, and in 1903 he became Dane Professor of Law, thus arriving finally at a famous professorship which had been held in succession by Joseph Story, Simon Greenleaf, Theophilus Parsons, and Christopher Columbus Langdell. Among the professors of Harvard University there is a distinct preference for an endowed and named professorship, for the reason that



an endowed and named professorship connects the new incumbent with the series of eminent men who have already held it. To succeed Professor Langdell in the Dane professorship was a distinct pleasure and satisfaction to Ames.

On the retirement of Professor Langdell from the deanship in 1895, Ames was made Dean of the Law School, and thereupon became in every sense the leader and head of the School. As an administrator he was firm, kindly, and extraordinarily generous in putting his time and his alert attention at the disposition of every student who desired to consult him. He permitted himself to be interrupted in his own work at any time of the day or evening by any student or any colleague; and his generosity in this respect was very freely availed of by both students and teachers. It was a good deal easier to ask the Dean where such a case could be found, or in what decision such a principle had been laid down, than it was to look up the matter for one's self; and the Dean's memory was astonishingly comprehensive, sure, and ready. His labors, both as professor and as administrator, were very much increased by this habit of holding himself at the disposition of any student or any teacher at any time. He passed most of his time in the School building, and was always accessible.

Ames's influence as a professor and as Dean was much increased by another of his moral attributes — he was always gentle of speech, quiet in manner, attentive to the person who was addressing him, and fully alive to the honorable requirements of the situation. Under all circumstances he was a gentleman, and a man of good will. His standards of conduct were the highest, both for himself and for the profession of teaching. No merely intellectual powers could compensate in his judgment for the lack in a teacher of a strong sense of duty and honor.

As a student of law Ames was chiefly interested in the common law; yet when it devolved largely on him, in succession to Professor Langdell, to supervise the increase of the Law Library, it appeared year after year that the Roman law was receiving its full share of attention. As a scholar his philosophic mind ranged willingly over all the fields of law; but as a teacher in the Harvard Law School he dealt almost exclusively with court-made common law. He was a wide reader in the field of legal history, and would gladly have devoted much time to that great subject; but that satisfaction was denied him — he never had time for it.

Ames's life was a happy and fortunate one; for he had domestic happiness, much pleasure in bodily exercise and out-of-door life, long years of devoted service to an institution and a cause he loved, and heartfelt satisfaction in a career which mounted in interest and value as life went on, and was best at its close.

*Charles W. Eliot.*

CAMBRIDGE, MASS.



## JAMES BARR AMES — HIS LIFE AND CHARACTER.

JAMES BARR AMES was born in Boston on June 22, 1846. He was a pupil in the Boston Latin School, entered Harvard College in 1863 with the class of '67, and at once took a high stand in his class. At the end of two years his health failed, and during the year 1865-66 he lived on a farm in New Ipswich, New Hampshire, reveling in the farm-work which all his life he dearly loved. He returned to college with his health thoroughly re-established, and graduated with the class of '68, having succeeded in maintaining the highest rank in the class-room, on the ball-field, and in the esteem of his class-mates. After two years spent in traveling and in teaching he returned to Harvard and entered the Law School. Langdell had just been made Dean, a regular course of study and examination for the degree had just been introduced, and Part I of the first case-book, Langdell's Cases on Contracts, was presented to the students. The use of this book was a touchstone of intellectual ability. To the great majority of the class it was mere folly; they wished to learn the law as the older professors in the school had settled it to be; and they felt sure that no way was easier, quicker, or surer than that of listening while these professors told them. Langdell's courses were soon practically deserted by all except a few devoted admirers, whose distinguished career at the bar and on the bench has justified their choice. The most devoted of all, and the one whose devotion was most effective in securing the success of the new method, was Ames. He was an indefatigable worker in the school, as throughout his life. He studied faithfully not only Langdell's courses but those of the other teachers as well. He was active and earnest in the work of his law club. He was at the same time an instructor in modern languages, and gave a considerable part of his time to teaching: six hours a week in his first year, and twelve hours a week in his second. He stayed in the school for a graduate year, and at the same time taught two courses in history in the college, — a history of England in the seventeenth century and a history of mediæval institutions.

At the end of this year he was appointed assistant professor of law. It was an utterly new experiment to appoint a young man to such a position. Teachers of law had always been mature men with many years' experience in the actual practice of the profession. He had, as President Eliot said, unusual qualifications, "for he was not only distinguished as a student, both in college and in the Law School, but has had more than two years' experience as a teacher in the college." The experiment was successful; but on March 26, 1877, a year and a half before the end of his term, Ames resigned. Two reasons led to this step: it had been stated that the corporation would appoint no one to a professorship of law who had no experience in practice, and he had no desire to remain an assistant all his life; and besides this, family reasons made it necessary for him to obtain a larger income. He determined to establish himself in practice in the new southwest. The corporation could not let so successful a teacher leave its service, and he was appointed to a full professorship of law on June 25, 1877. He served the University as assistant professor and professor of law without a year's interruption by leave of absence for over thirty-six years. In 1895 he succeeded Langdell as dean of the faculty.

Neither his scholarship nor his skill in teaching came to him as a brilliant endowment of nature. He was earnest, patient, and thorough, and it was these qualities that gave him power as a scholar. He made a profound study of the Year Books and other early books, not to fill his mind with dry-as-dust information, but to learn from the earlier and simpler law what are the fundamental principles and conceptions out of which the present law has grown; and no man has excelled him in mastery of these fundamental principles. He taught a wide range of subjects during the thirty-six years of his service; in fact, he taught fully one-half the courses now offered in the school. He thus acquired a store of analogy, and ability to follow a principle through its widest applications. There were few topics of the law with which he was not familiar; and those few he hoped at some time to investigate. He often said that he meant sometime to teach property, criminal law and the conflict of laws, in order to complete the round of his studies. But with all his knowledge of legal principle he did not neglect a minute and patient study of the decisions of the present day. For years he examined each number of the National Reporter System as it appeared, and noted every case



in which he was interested on a slip of paper. The accumulations of the last year or two now fill several drawers of his study desk. This habit of examining decisions gave him a familiarity with current law which lawyers in active practice sometimes fondly believe can better be secured at the bar; he was a master of the actual condition of the authorities. His colleagues frequently remonstrated with him for spending so much time in merely collecting authorities and printing them in notes; but he said that they were on his mind, and he must print them to get rid of them.

By these methods he grew in scholarship; and what he had himself mastered he taught his younger colleagues as well as his pupils. It was his singular patience in the discussion and exposition of legal principles with his colleagues that has created in Cambridge what we may fairly claim to be a school of legal thought as well as a law-school. His thoroughness of historical training, his breadth of study, his mastery of modern authority, gave him a readiness in the use of his knowledge. He always had his learning in hand. He could discuss a question fully, and after dropping it take it up again a year or five years later with an immediate and perfect familiarity with the whole question. No difficulty could be raised which he did not think out to the end. He would come into the stack of the school the next day, or the next week, with a solution which he had thought out in bed, or while he was running to luncheon, and the discussion was resumed. He was our teacher as well as our dear friend until the day of his death; he made the stack of Austin Hall a place of delight for us, and it was with bitter regret that we left it for the lonely wastes of Langdell Hall, and the daily colloquies with our master became a tender memory.

But the work that he did as head of the school and friend of the students was the real expression of his genius. For his students he gave freely and absolutely of his time and thought, and he refused to keep office hours because he preferred to be accessible at every moment. His chief regret in leaving Austin Hall for Langdell was the difficulty it put in the way of easy access for the students to the professors. He refused to give up any detail of administration into the hands of a secretary if it would prevent his personally talking to a student concerned. In the last years the interruptions were so constant that he could hardly find a minute between nine o'clock and five for his own work. This was a hardship, for he loved his work, and

had much to do. He always looked forward to the time when he had finished just the little case-book he was at work upon, so that he might devote his time to partnership, to trusts, and above all, to legal history; he hoped to write on them, he said, before he set out on the long journey. He promised his colleagues again and again to give up the making of case-books and get down to serious work — after just one more. But in spite of this desire for serious scholarly work, he gave up his time without a murmur, deliberately and understandingly, to his administrative tasks. He chose to be the friend of his pupils rather than the great author he might have been; and to elevate the character of the bar by the example of an upright life filled full of the spirit of equity and love rather than by writings that should illuminate the science of law. Once when he had a serious and important piece of work to do in haste, and had spent the entire morning in unnecessary interviews with students, he went so far as to call it a morning wasted; but almost before the words were spoken he corrected himself, "No, not wasted; put to the very best use."

His perfect adaptation to this great work came gradually. In the first ten years of his teaching he was merely the youngest in a faculty of esteemed teachers. His readiness to see and talk to the students was just beginning to make him their first friend when the founding of the HARVARD LAW REVIEW gave him a new outlet for his influence. When the projectors of the magazine went to the faculty with their plan they found differing degrees of warmth in the support offered; but Ames approved without reserve, wrote the first leading article, and became the chief adviser and helper of the editors throughout his life. This brought him into the friendly and intimate personal relation with the editors which was one of the greatest pleasures of his life. When he became Dean his personal intimacy with the student body rapidly grew. Whatever his administration as Dean may mean to the bar of the country and to legal education, there is no doubt that to Harvard it meant the coming of a fine personal influence into the life of the students.

His utter devotion to the teaching of law meant that law and the Law School were never out of his thoughts. He himself thought that he had long seasons of rest; not physical rest, certainly, for in summer on his farm at Castine no hired hand worked harder about the daily tasks of the farmer. He loved strenuous physical work as he loved to wrestle with a legal problem or to help a student. But this manner



of life did not mean mental rest, for it was not inconsistent with constant thought and pondering on intellectual problems. Truly, as he said himself, his was an unusually full life, and he had been able to accomplish more than most men; and so for forty years without intermission he devoted himself to the law and the Law School.

He retained his affection for his pupils and his interest in them after their graduation. Few men who have come back to see him can forget the quick-kindling glance of recognition, the firm hand-clasp, and the hearty "Why, how do you do?" He was proud above all of their loyalty to the school, and relied upon it as the final security of our continued prosperity.

He was unalterably opposed to anything like show or display, and refused to advertise the school in any way. When Langdell Hall was opened, and the faculty voted to celebrate the occasion by an oration, he acquiesced and invited an orator; but he was immensely relieved when the orator was unable to come. This quality was an aspect of his personal modesty. Anything which savored of self-praise was most distasteful. He especially objected to the practice of spreading upon the records of a faculty a tribute to a deceased member of it. His earnest and oft-repeated charge prevents the adoption by his colleagues of any minute of his great services to the school and to legal education. The memory of his life and works will be cherished where he would have it—in the hearts of his pupils.

*Joseph H. Beale.*

CAMBRIDGE, MASS.

## JAMES BARR AMES — HIS SERVICES TO LEGAL EDUCATION.

THE services of James Barr Ames to the cause of legal education were of various kinds. For thirty-six years without interruption he taught in the Harvard Law School, and every student that was graduated from the school during that period came under his instruction, and this in itself implies a profound influence upon legal education and upon the legal thought of his generation. The earlier years of his teaching were also the years when the case system of instruction for law students was on trial, and Mr. Ames's success in adapting for practical use the fundamental idea of his predecessor, Dean Langdell, unquestionably had much to do with the ultimate triumph of the case system.

Mr. Ames also had a large part in directing legal education, wholly apart from his work as a teacher, by his administration of the Harvard Law School during the period of its greatest growth for the fifteen years preceding his death; and finally in his later years he exercised an influence on the legal education of the country in other ways than by promoting the interest and efficiency of his own school. All these means of influence deserve attention.

To many of his pupils it seems that he was a teacher great almost beyond comparison with any other. Many things combined to give him such preëminence. In the first place he was a very learned man. During all his life, after he first took up the study of the law, he was an assiduous reader of the decisions of the courts; and a retentive memory enabled him to preserve in his mind the results of this reading, and often to recall the volume where the case he wished was to be found. He was omnivorous in his reading of law reports. When he was a young man he made a practice of taking the Year Books to his summer home and literally went through them, making the notes which afterwards he partially elaborated in the essays on legal history which distinguished the early volumes of the *HARVARD LAW REVIEW*. None the less assiduously he went through each part of the National Reporter System as it appeared, taking notes of all decisions which



interested him. Though not a trained civilian he was a good linguist, having taught Latin in a preparatory school and French and German in Harvard College as a young man. He could, therefore, read easily foreign books on the civil law, and throughout his life it was his habit when puzzled by a question of theoretical jurisprudence to see if light could be obtained from the writings of continental lawyers. It was largely owing to this habit and the benefit which he felt might be derived from it that the library of the Harvard Law School owes its extensive collection of treatises, periodicals, reports and statutes of the modern civil law.

In order to freshen and widen his knowledge of the law it was Mr. Ames's habit from the beginning of his career as a teacher, until the end, to change, from time to time, the subjects which he taught. He rarely taught identically the same subjects two consecutive years. He also rarely took up a subject without teaching it at least several years, as he deemed that necessary in order to get a full grasp of its principles. As a result of this habit there were very few courses in the curriculum of the school at the time of his death with which he had not made himself familiar by giving instruction in them. All of his colleagues could, and did, discuss with him the most knotty problems of their several specialties with certainty of getting aid. His familiarity with the principles and decisions on the various subjects which he taught was increased by the preparation of case-books. Many courses when he first assumed them were not provided with case-books, and he took enthusiastic pleasure in preparing them. Preparation of a case-book by him meant going over substantially all the cases on the subject to which the book was devoted. A few selected decisions he printed for his students to read; the rest he arranged in elaborate annotations to the cases which he printed. In all work of this sort which he did the analysis and arrangement of the subject were of primary importance to him. His mind was thus furnished with an orderly scheme of his subject as well as with the authorities upon it.

But a display of erudition was by no means a prominent feature of Mr. Ames's work in the class room. His great store of knowledge of legal principles in all departments of the law was freely drawn upon, as was his intimate acquaintance of the historical development of the doctrines which were under consideration; but he rarely went into detailed consideration of authorities in the class room. The

"God of Things as They Are" was by no means his favorite legal deity. He was an idealist in law, and his supreme gift as a scholar and a teacher was his constructive legal imagination. He believed it to be the function of the lawyer, and especially of the teacher of law, to weld from the decisions a body of mutually consistent and coherent principles. To his mind there was but one right principle upon a given point, and if decisions failed to recognize it, so much the worse for the decisions. He would never answer in the lecture room a question as to the law of a particular State, preferring to develop the fundamental principles of his subject as he conceived it, leaving the matter there. That all the results of a mind so fertile in theory as Mr. Ames's should find ultimate acceptance is too much to expect; but that the legal analysis which he led his classes to make on his favorite subjects will be without influence on the law, is also not to be believed. Often his results were as satisfying as they were always brilliant and ingenious.

Mr. Ames began the study of the law when Mr. Langdell first began to teach, and became the colleague of his master only three years after the latter had entered upon his duties as Dean of the Harvard Law School. Mr. Langdell introduced the case system for students as a method of study more particularly than as a method of teaching. In his preface to his "Cases on Contracts" he said, "Of teaching, indeed, as a business, I was entirely without experience; nor had I given much consideration to that subject except so far as proper methods of teaching are involved in proper methods of study." Mr. Langdell's primary position was that the only scholarly way to learn the law of a subject was to read all the decided cases bearing upon it — an easier thing to do in 1870 than at the present time. Professor Thayer in the preface to his "Cases on Evidence" lays stress on the case system being one of study rather than of teaching. It was Mr. Ames that gave the system its success as a method of teaching. Doubtless good teachers of law have always been in the habit of putting supposititious cases to their classes. By combining this practice with the use of decisions selected quite as much for the adaptability of their facts to the purposes of discussion as to their authoritative force as precedents (though the latter element was not wholly disregarded), and by a skill hardly surpassed by Socrates in inducing his pupils to answer by their own reasoning the problems which the cases suggested, Mr. Ames developed a remarkably flexible and effective



mode of teaching from cases. That his teaching has been in the main the model for his younger colleagues and for the many graduates of the Harvard Law School now following his profession in other law schools is certain.

In 1895 Mr. Ames became Dean of the Harvard Law School; for many years before this he had been Mr. Langdell's chief lieutenant.

During the years of Mr. Ames's leadership the standards of scholarship required for admission to the school and for securing its degree were continuously made more severe. Mr. Ames's faith that excellence would always win recognition was unquestioning and inspiring to others. The more membership in the school meant to a student and the severer the test required for its degree, the more eager good students would be to resort to the school, was never doubtful to Mr. Ames's mind. Accordingly he had no doubt or hesitation in requiring a college degree as a requisite for admission to the school, and he was the least surprised of the Faculty when this requirement was almost immediately followed by a large growth in the numbers of students. The exclusion of all special students who could not comply with the tests required of students in regular standing, and the exclusion from the school of all students who failed to pass examinations in at least four full courses, were other rules of far-reaching effect started by him and carried into effect with good results during his administration. A poor but able and ambitious student was better served he thought by helping him to meet severe requirements than by excusing him from them.

Beside his constructive work in shaping the policy of the school in such vital matters, Mr. Ames's influence was constantly felt both by the Faculty and students of the Law School. He made it his business as well as his pleasure to keep on intimate terms with each of his colleagues, to inform himself of the work and plans of each and to further them so far as possible. In this way he maintained and developed the *esprit de corps* of the Faculty. His intercourse with the students was even more important. He was not an administrator of the type who trains and directs others to do the work at hand; his plan was rather to attend to all details himself. Students always had ready access to him, and questions arising in regard to the construction of rules were generally decided in interviews with him rather than with a minor official. All students in doubt or difficulty

or pecuniary need, laid their difficulties before him with assurance of sympathy and, if possible, of help; yet he was never weak or careless in giving help. His sympathy was always controlled by justice, and his idea of justice was not simply that each applicant should be treated as well as any other applicant under similar circumstances, but that he should be treated no better than other applicants had been. His position often compelled him to say disagreeable things, and when he felt it his duty to say something which he knew must be unpleasant to the hearer, he never hesitated to say it if he felt it ought to be said. He had, however, in a rare degree the faculty of saying such things without causing personal animosity, because it was always evident that his own statements were based on a sense of duty. His hold upon the students was thus made very strong by their absolute confidence in his sympathy and in his sense of justice.

In the earlier years of his career, Mr. Ames seems to have felt that his duty to legal education consisted in building up the Harvard Law School; that other institutions must do their work as seemed best to them and that little could be hoped for in the way of coöperation; but in the later years of his life his views on this matter much expanded. Partly, no doubt, this was due to changed conditions. The methods of the Harvard Law School, from having been universally decried, were followed by many other schools. Young graduates of the Harvard Law School filled important places as teachers in such schools, and similarity of methods of teaching as well as in the ideal of training scholarly lawyers became common. His recommendation of young men for the post of teachers in other schools was widely sought, and through these teachers, as well as through his case-books, and through his friendship with teachers in other schools, he exercised a great influence, though one not easily measured, in the legal education of the country.

However one may seek to analyze the sources of influence of a great teacher and the methods which give him success, one is drawn at last to explain a great part of it by his personality; and of no man can this more truly be said than of Mr. Ames. It has always seemed to me a cause for belief in the essential soundness of the judgment as well as of the heart of the youth of the country that Mr. Ames commanded so instantly and universally the admiration and love of those with whom he was thrown. His gifts though many were not showy, and to make any conscious effort to exhibit them would have



been abhorrent to his nature. He was always ready to keep silent when under no duty to speak. If some one else wished to take the foreground, Mr. Ames was ready to stand in the background and, if necessary, give a little quiet assistance to the man who was in front; yet no one was long associated with him without recognizing his quality and being inspired by it.

Rather than use words of my own to attempt to express the source of inspiration that he was to his pupils, I prefer to quote from one of many letters received after his death. The writer of this letter was graduated a number of years ago, and on leaving the Law School returned to his home in California. Since that time I do not think he can have seen Mr. Ames, and any communication by letter between the two must have been rare. Time, distance, and contact with a busy world have exercised every power of giving a correct perspective and of dimming earlier impressions; yet such a man, no longer in early youth, can write of his former teacher:

"No other man with whom I have come in contact has made such an impression upon me, or awakened in me such a strong admiration and desire to serve. I have often thought that if the days of war were to come again with men following chosen leaders, Dean Ames is the one under whom I should want to enlist. He was the kind of man one worships and would die for. I have never felt the same about any other man I have ever known."

These words will strike a responsive chord in many hearts.

Mr. Ames led the life of a scholar, and his work was largely in the world of books and of abstract ideas. He was a pacifier of disputes, and loved peace so long as it was consistent with righteousness. But those who knew him saw in him that combination of courage with gentleness and self-discipline which in other days and circumstances has given fame on the field of battle, and which marked a spiritual kinship between our lost leader and Sir Philip Sidney and the Chevalier Bayard.

*Samuel Williston.*

CAMBRIDGE, MASS.

## JAMES BARR AMES—HIS PERSONAL INFLUENCE.

THE suggestion that the HARVARD LAW REVIEW be established met at once with the response: "Let's consult Mr. Ames. If he approves, we'll do it." The project received his cordial support: the editors, his encouragement and advice. Naturally, the place of honor in the first number was given to his article on "Purchaser for Value," — the first of a long series of brilliant essays, in which he revealed the results of his researches in the history of the common law and equity and their application to the legal problems of to-day. Through the REVIEW, his influence has extended far beyond the students of Harvard Law School and those who have come within their sphere of work; throughout our country and England, his contributions to legal history have stimulated younger scholars and have awakened an interest to plow in this too long neglected field.

His oft-times novel theories, especially in the law of trusts, are gradually gaining recognition in the courts. No other man has so influenced the development of the law of quasi-contracts in this country, both directly and through his students and colleagues. These subjects engaged him, because they, more than any others, gave larger scope for his insistence on the ethical aspects of the law and better opportunity to make legal principles produce just results.

His direct influence on legislation began with the searching criticism to which he subjected the Uniform Negotiable Instrument Act in a series of articles published in this REVIEW. Unfortunately they came too late to effect much needed changes in its provisions. But even though his influence was but slight in respect to this legislation, it was profound on the further work of the Commission. He not only participated therein as Commissioner from Massachusetts, but either personally or through his disciples, who have drafted all of the subsequent acts, he has had a predominating influence in shaping both the form and the content of this work, destined to be the foundation of the commercial law of the United States.



The law schools of the country generously acknowledge their indebtedness to him. His advice was constantly sought by university presidents and trustees in founding schools and in selecting law faculties, as well as by professors in prosecuting their own researches: in the Association of American Law Schools he was the leader. No narrow university lines hemmed in his sympathy. The only rivalry between the schools that he recognized was that of producing, out of the raw material, lawyers capable of sound reasoning, men devoted to the right use of their training in the interests of their fellow men and their country.

Through the graduates of his own School, as lawyers, judges, writers, and particularly as teachers, his labors are exerting a fertilizing influence on American jurisprudence. Much that he first taught has now become the common property of the profession.

Fitted as are few for original research, endowed with unrivaled power in extracting sound principles from the bewildering maze of decisions, skilled in the highest degree in generalization, he could in the judgment of many ill afford to spare the time demanded by his students, especially since he became Dean of the Harvard Law School. But for him, their needs came first; to them he gave his time, his thought, himself in unbounded measure. A student, perplexed over a legal problem, could interrupt him in any work and be sure of his help. He gave this both in his study and in the class room, not by direct answer but by suggesting the sources through the investigation of which the student himself would find the solution.

He was the ideal teacher, courteous and patient. If he led the student to the brink of a precipice, he did not let him fall over: he never failed to indicate the path back to safety. Modestly, in all discussions, he placed the student on his own level; both, apparently, were groping in the wilderness for the truth; and while he would give possible clues, he was ever ready to discuss the student's suggestions and to follow them until it became apparent to the whole class that they led only to confusion. Then, through further questioning, he gradually disclosed the true path to the light. And if, at times, one or the other man wandered away from his leading and opened up new roads to the goal, his acknowledgment was as quick as it was hearty. Following the earlier methods of that master mind, Langdell, he aimed not so much to impart information, as to develop the analytical powers of the men, to make them think as lawyers.

The scholar was respected, the teacher esteemed, but the wise-hearted man was beloved. His genuine interest in his students' work, his lofty ideals of the true lawyer, his personal charm won their hearts. As Austin G. Fox said of Langdell, "Who can estimate how much we owe not merely to your instruction, which never suggested the pedagogue, but to that gentle influence which came to us as an emanation."

*Julian W. Mack.*

CHICAGO, ILL.



## THE INHERENT LIMITATION OF THE PUBLIC SERVICE DUTY TO PARTICULAR CLASSES.

### I.

IT is ordinarily said that those who have undertaken a public service owe a duty to the public in general, whatever may be their inclinations. But it will be found upon inquiry that in the case of every public calling service is legally due to persons belonging to a special class, and not to every member of the public, as such. This is the inevitable consequence of the elementary principles as to the essential nature of public employment and the necessary scope of public profession. By these fundamental rules an employment is held public in its nature only in so far as it is affected with a public interest and only to the extent that it has been undertaken. Both that public interest and that public profession must coexist in order that there may be a public duty in particular cases. That being so, it is natural to find that in most public callings either the real necessity is confined to a certain class or the undertaking assumed has been solely toward a special class. It is to that extent and to them that the public duty is therefore established. There have already been examples enough of limitations of this sort in adjudicated cases to make this matter sufficiently plain.

### II.

From ancient times it has been recognized that in certain public employments the public duty is owed only to travelers. It is only as to dealings with travelers that these callings are affected with a public interest. Those who offer necessary services, protection or transportation, to wayfarers and travelers always have the upper hand. Their monopoly is temporary, but it is effectual. These very same persons, in offering their services to the local population or under other circumstances have no monopoly at all. There is every reason, therefore, why innkeepers should be bound to entertain weary

wayfarers, and why carriers of passengers must take up travelers bound their way, but no reason why this duty should be pressed beyond these particular classes. But as all within the class, being similarly circumstanced, have practically the same need, it should not be open to those who must conduct these services with due regard to the needs of the public to restrict further their obligations. Thus the suggestion in one case<sup>1</sup> that an innkeeper might confine his obligation to those who might come in their carriages, or in another<sup>2</sup> that travelers belonging to an unpopular race might be excluded, are both inconsistent with the public duty which is owed to all travelers without regard to station or condition.

The inn is established for travelers, and it is such persons only who are the necessary objects of the law's solicitude. One who is not a traveler does not need the inn to protect him, for he can provide himself a lodging for that purpose. The public duty of the innkeeper is therefore owed to travelers only, and no one who is not a traveler can demand to be received at an inn. There is not even a *primâ facie* duty owed to persons generally who apply for entertainment at an inn, as appears in one of the early cases<sup>3</sup> where an indictment against an innkeeper for turning a man away was quashed for not saying he was a traveler.

"Common inns," says Lord Coke in a characteristic passage, "are instituted for passengers and wayfaring men; for the Latin word for an inn is *diversorium*, because he who lodges there is *quasi divertens se a via*; and so *diversoriolum*. And therefore if a neighbor, who is no traveler, as a friend, at the request of the innholder lodges there, and his goods be stolen, etc., he shall not have an action; for the writ is *ad hospitandos homines, etc., transeuntes in eisdem hospitantes*."<sup>4</sup>

That the business which the carrier of passengers undertakes is the transportation of travelers is so obvious that there are but a few cases which directly state it.<sup>5</sup> The necessary thing is that those upon a journey should be speeded on their way. And the carrier of passengers does not undertake any other service than the transportation of travelers. He is not bound to furnish the use of his facilities

<sup>1</sup> *Johnson v. Midland Ry. Co.*, 4 Exch. 367, 371 (1849).

<sup>2</sup> *State v. Steele*, 106 N. C. 766, 770 (1890).

<sup>3</sup> *Rex v. Luellin*, 12 Mod. 445 (1700).

<sup>4</sup> *Calye's Case*, 8 Coke 202 (1584).

<sup>5</sup> *Jencks v. Coleman*, 2 Sumn. 221 (1835).



to carry one for any purpose other than transportation. In order to demand carriage one must be desirous of reaching his destination. Therefore one has no right to demand carriage for the purpose of selling "books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles, when it interferes with their own interests."<sup>1</sup>

### III.

One who is making a very short journey may demand transportation as a traveler; however short the distance the passenger may be taking, the carrier is liable as such.<sup>2</sup> Certainly under the modern decisions a man need not be at the time engaged upon a journey of any considerable length in order to be in a position to demand admission to an inn as a traveler.<sup>3</sup> Notwithstanding some *dicta*<sup>4</sup> it is entirely possible for a resident of the same locality to be considered a traveler. Where, for instance, a man on his way from his city office to his suburban home stopped at an inn to get dinner, he was held to be a traveler.<sup>5</sup> Justice Kennedy said in that case: "It does not seem to me to make any difference whether his journey be a long or a short one." It has been held that a man who takes a walk and just before reaching home goes into an inn to get a drink is not a traveler, and cannot demand it;<sup>6</sup> but if in the course of a long walk for pleasure he stops on his way for refreshment at an inn, he is entitled to be entertained; for he is none the less a traveler because the purpose of his journey is merely pleasure.<sup>7</sup>

The determination of the question whether one who is staying at an inn is a guest or a boarder may depend upon whether the person is a resident of the town or a stranger. So a foreigner visiting the country and staying for a considerable time at a hotel was held a guest,<sup>8</sup> and a resident of another town, visiting the town where the

<sup>1</sup> Quoted from *The D. R. Martin*, 11 Blatch. 233 (1873). See also *Burgess v. Clements*, 4 Maule & S. 306 (1815).

<sup>2</sup> *Parmelee v. Lowitz*, 74 Ill. 116 (1874).

<sup>3</sup> *Atkinson v. Sellers*, 5 C. B. N. S. 442 (1858).

<sup>4</sup> *Carr's Case*, 1 Roll. Abr. 3, pl. 4 (1583).

<sup>5</sup> *Orchard v. Bush* (1898), 2 Q. B. 284, 289.

<sup>6</sup> *Murphy v. Innes*, 11 So. Australia 56 (1877).

<sup>7</sup> *Taylor v. Humphreys*, 30 L. J. M. C. 242 (1861).

<sup>8</sup> *Metzger v. Schnabel*, 23 N. Y. Misc. 698.

inn was situated for business purposes merely, was held to be a guest.<sup>1</sup> On the other hand, an employee of a railroad, making his regular trips, and stopping over at each end of his route at the hotel, where he rents a room by the month, is not a guest. He is, as the court said, "a citizen of the community at both ends of the route."<sup>2</sup> So where a man breaks up his home and goes to a hotel in the same town, he is a boarder.<sup>3</sup> But in a leading New York case<sup>4</sup> the family of an army officer stationed at a nearby post were held to be guests of the hotel at which they remained for several months, on the ground that they would follow him whenever he might be ordered elsewhere. Where a man sent his family to an inn in a distant city and they remained there for several months, while he made them an occasional short visit, his family were boarders and he was a guest.<sup>5</sup>

One may thus remain a traveler for a long time. Thus in one Year Book case the weary suitor who followed the royal court from sitting to sitting, his hopes long deferred, was said to be still a traveler. But after a considerable lapse of time one almost inevitably becomes a resident; and as he has no longer a right to demand entertainment the innkeeper may exclude him.<sup>6</sup> In a recent English case of this sort where a woman had remained at a hotel as a resort for about ten months, it was held that she could be ejected. Lord Esher applying this test: "The question whether a person has ceased to be a traveler seems to me again to be a question of fact, and mere length of residence is not decisive of the matter, because there may be circumstances which show that the length of stay does not prevent the guest being a traveler, as, for instance, where it arises from illness; but it is wrong to say that length of time is not one of the circumstances to be taken into account in determining whether the guest has retained his character of traveler."

#### IV.

While the duty of the carrier to receive passengers for carriage extends only to travelers, he owes an incidental duty to certain other

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<sup>1</sup> *Beale v. Posey*, 72 Ala. 323 (1882).

<sup>2</sup> *Horner v. Harvey*, 3 N. Mex. 197.

<sup>3</sup> *Meacham v. Galloway*, 102 Tenn. 415 (1899).

<sup>4</sup> *Hancock v. Rand*, 94 N. Y. 1.

<sup>5</sup> *Lusk v. Belote*, 22 Minn. 468 (1876).

<sup>6</sup> *Lamond v. Richard*, [1897] 1 Q. B. 541.



persons whose purpose in coming to the carrier is connected with transportation of passengers or goods though they do not present themselves as travelers. Thus a carrier must, it would seem, admit a person who comes to make an inquiry about trains or to ask for a timetable.<sup>1</sup> So he must admit to his premises a person coming to a train to mail a letter.<sup>2</sup> And so one is entitled to admission to the premises of a carrier who comes to look for freight which is expected to arrive,<sup>3</sup> or to help unload freight which has arrived.<sup>4</sup> Upon similar principles one may properly enter an inn to inquire its terms or to ask for mail addressed to him.<sup>5</sup>

A person who desires shelter merely is not one whom the carrier of passengers is bound to serve; and it may, therefore, decline to receive such a person on its premises. Loafers have no rights upon a carrier's premises. A railroad company is not bound to keep open its station after the last train has left in order to shelter an intending passenger who, having missed his train, is now waiting for a street car.<sup>6</sup> Similarly one who is not a guest, or intending immediately to become a guest, has, generally speaking, no right to enter or remain in the inn against the objection of the innkeeper.<sup>7</sup>

## V.

It is well agreed that the carrier of passengers is under a duty to receive persons who come to help passengers in some way. Thus a hackman who comes to a station to bring a passenger is entitled to a proper reception.<sup>8</sup> A common case of this sort is that of a person who comes to the carrier's premises in order to assist a passenger on board or to bid him good-bye. Such a person, though not a passenger, is entitled to demand of a carrier that he be admitted to the station; and he may even, in order to assist a passenger, demand admittance to a train, at least until the carrier furnishes proper assistance.<sup>9</sup> Similarly the carrier is bound to admit to his premises one

<sup>1</sup> *Bradford v. Boston & M. R. R.*, 160 Mass. 392 (1894).

<sup>2</sup> *Hale v. Grand Trunk R. R.*, 60 Vt. 605 (1888).

<sup>3</sup> *Toledo, W. & W. Ry. v. Grush*, 67 Ill. 262 (1873).

<sup>4</sup> *Holmes v. North Eastern Ry.*, L. R. 4 Ex. 254 (1869).

<sup>5</sup> *Strauss v. County Hotel & W. Co.*, 12 Q. B. D. 27 (1883).

<sup>6</sup> *Heinlein v. Boston & P. R. R.*, 147 Mass. 136 (1888).

<sup>7</sup> *Commonwealth v. Mitchell*, 2 Parsons (Pa.) 431 (1850).

<sup>8</sup> *Tobin v. Portland, S. & P. R. R.*, 59 Me. 183 (1871).

<sup>9</sup> *Evansville & T. H. R. R. Co. v. Athon*, 6 Ind. App. 295 (1893); *Louisville, etc. R. Co. v. Crunk*, 119 Ind. 542 (1889); *Galloway v. Chicago, etc. R. Co.*, 87 Iowa

who comes to meet an arriving passenger.<sup>1</sup> Thus where a man who had come to a railway station to meet his wife was injured by a defect in the premises, he was held entitled to compensation. The railway, the court said, was bound to keep its premises in safe condition for its customers, and the injured person was a customer.<sup>2</sup> Mr. Chief Justice Graves said: "Had his errand been to receive a bale of goods or a horse, no one would doubt that he had all the rights of a customer, and it seems little less than preposterous to contend that the right was not simply different or inferior, but absolutely wanting, because it was his wife that he went for."

Similar in principle are those cases where a stranger may desire to enter the inn, not merely for his own pleasure but because the convenience of a guest of the inn calls him there. While no right to enter the inn can be based on his own claim, he can under certain circumstances claim to be exercising a right of the guest. Where such is the case it would seem that his right to admittance is as clear as the right of a guest. It must be borne in mind, however, that in order to show a right of admittance he must base his claim on a right of the guest whom he comes to see. In the ordinary case it is tolerably clear that a stranger who comes by appointment to do business with a guest has a right to be admitted. "It is conceded," said Parker, J., in *Markham v. Brown*,<sup>3</sup> that he may be bound to permit the entry of persons who have been sent for by the guest."

The same distinctions apply to persons coming to railroad stations; it is only so far as the interest of the passenger requires it that this service can be demanded of the carrier. Thus when a person came to a station out of curiosity, in order to see the President of the United States, who was a passenger on a passing train, the

458 (1893); *Lucas v. Taunton & N. B. R. R.*, 6 Gray 64 (1856), *semble*; *Doss v. Missouri K. & T. Ry. Co.*, 59 Mo. 27 (1875); *Rott v. Forty-second St., etc. Ferry R. Co.*, 56 N. Y. Super. Ct. 151 (1888); *Dunne v. N. Y., N. H. & H. R. R. Co.*, 99 App. Div. 571 (1904); *Morrow v. Atlanta, etc. A. L. Ry. Co.*, 134 N. C. 92 (1903); *Johnson v. So. R. Co.*, 53 S. C. 203 (1898); *Izlar v. Manchester & A. R. R. Co.*, 57 S. C. 332 (1899); *Gulf, etc. Ry. Co. v. Williams*, 21 Tex. Civ. App. 469 (1899); *Hamilton v. Texas R.*, 64 Tex. 251 (1855); *Texas & P. Ry. v. Best*, 66 Tex. 116 (1886); *Houston & T. C. R. R. Co. v. Phillio*, 96 Tex. 18 (1902); *Dowd v. Chicago, M. & St. P. Ry. Co.*, 84 Wis. 105 (1893), *semble*.

<sup>1</sup> *McKone v. Michigan C. R. R.*, 51 Mich. 601 (1883); *Missouri, K. & T. Ry. v. Miller*, 8 Tex. Civ. App. 241 (1894).

<sup>2</sup> *McKone v. Michigan C. R. R.*, *supra*.

<sup>3</sup> 8 N. H. 523 (1837).



carrier owed him no duty.<sup>1</sup> "The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendant had nothing to do with that." A similar case was one where one boarded a train to speak with an acquaintance and was injured under circumstances which would have shown liability if the plaintiff had been a passenger. But it was held that the defendant company owed such a person no duty of that sort, since he was not upon the train in connection with any duty which the carrier owed the passenger.<sup>2</sup>

## VI.

It is clear therefore that the innkeeper and the carrier owe no duty whatever to give shelter and protection to the public in general. It is only to such wayfarers and travelers who apply as guests and passengers that it must undertake those extraordinary responsibilities which the law imposes in that behalf. Even those persons just described who are attending and assisting guests and passengers form an intermediate class. That such persons are not guests or passengers is clear, but they are, in the language of the cases, "customers," and are entitled to safe and properly lighted premises.<sup>3</sup> But they are not entitled to the active protection which is due to passengers. Thus, while waiting in a station for a train, in order to meet a passenger, such a person is not entitled to protection against the assault of a stranger.<sup>4</sup>

Where the person actually gets on board the train, assisting a passenger, and the train starts without giving him time to alight safely, the question whether the carrier has been guilty of a breach

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<sup>1</sup> *Gillis v. Pennsylvania R. R.*, 59 Pa. 129 (1868).

<sup>2</sup> *Bullock v. Houston & T. C. Ry.*, 55 S. W. 184 (Tex. Civ. App. 1900). The same law applies if one having assisted a person on board returns later to talk with him. *St. Louis, I. M. & S. Ry. Co. v. Tomlinson*, 69 Ark. 489 (1901).

<sup>3</sup> *Ill. Cent. R. Co. v. Griffin*, 80 Fed. 278 (1897); *Georgia Ry., etc. Co. v. Richmond*, 98 Ga. 495 (1896); *Toledo, W. & W. Ry. v. Grush*, 67 Ill. 262 (1873); *Tobin v. Portland, S. & P. R. R.*, 59 Me. 183 (1871); *Bradford v. Boston & M. R. R.*, 160 Mass. 392 (1894); *McKone v. Michigan C. R. R.*, 51 Mich. 601 (1883); *Union Pac. R. Co. v. Evans*, 52 Neb. 50 (1897); *Hauk v. N. Y., etc. R. Co.*, 34 N. Y. App. Div. 434 (1898); *Hamilton v. Texas & P. Ry.*, 64 Tex. 251 (1855); *Missouri, K. & T. Ry. v. Miller*, 8 Tex. Civ. App. 241 (1894); *Hale v. Grand Trunk R. R.*, 60 Vt. 605 (1888); *Holmes v. North Eastern Ry.*, L. R. 4 Ex. 254 (1869).

<sup>4</sup> *Houston & T. C. R. R. Co. v. Phillio*, 96 Tex. 18 (1902).

of duty is a difficult one. One or two cases are clear enough. If the conductor has no notice that the assistant was on the train, and the train stops the usual and reasonable time, the carrier has sufficiently performed its duty.<sup>1</sup> "In order to place upon the company the duty of holding the train specially for him to disembark, he must have given notice of his intention." But if the conductor had notice that the assistant was on the train, the carrier must give him a reasonable time to alight.<sup>2</sup> Even if the conductor does not know of the presence of the assistant, there is good authority for holding the carrier if the train starts without giving him a reasonable time to alight after notice that the train was about to start.<sup>3</sup> This would not be "such ordinary care as the defendant was bound to exercise both toward passengers and persons in the situation of plaintiff."

## VII.

In several of the public services the undertaking is limited to the occupiers of the premises. The water companies, the gas companies, the electric companies, and the telephone companies which undertake to distribute their product or perform their service generally throughout the city, do not undertake to serve every person as such. Their services are peculiarly necessary in connection with the use of buildings, and their obligation is properly held to be limited to occupiers of the premises by the general character of their customary undertaking.

One of the most interesting of the comparatively few cases upon the question of the classes of persons who can demand supply from such service companies arose recently in New Jersey.<sup>4</sup> This was a dispute between the Public Service Corporation, which was engaged in the supply of gas to Jersey City, and the American Lighting Company, the proprietor of peculiar burners. The Public Service

<sup>1</sup> The quotation following is from *Missouri, K. & T. Ry. v. Miller*, 8 Tex. Civ. 241 (1894). See also *Coleman v. Georgia R. R.*, 84 Ga. 1 (1889); *Hill v. Louisville & N. R. R.*, 124 Ga. 243 (1905); *Griswold v. Chicago & N. W. Ry.*, 64 Wis. 652 (1885).

<sup>2</sup> *Doss v. Missouri, K. & T. Ry.*, 59 Mo. 27 (1875). See also *Louisville & N. R. R. v. Crunk*, 119 Ind. 542 (1889); *Johnson v. Southern Ry.*, 53 S. C. 203 (1898).

But see to the contrary, *McLaren v. Atlanta & W. P. R. Co.*, 85 Ga. 504 (1890).

<sup>3</sup> *Lucas v. New Bedford & T. R. R.*, 6 Gray (Mass.) 64 (1856).

<sup>4</sup> *Public Service Corporation v. American Lighting Co.*, 67 N. J. Eq. 122 (1904). See also *American Lighting Co. v. Public Service Corp.*, 132 Fed. 794 (1904).



Company had for a long time been lighting the streets of Jersey City upon the basis of annual contract. At the bidding of 1903, the American Lighting Company came in with the lowest bid; and the lighting was accordingly let to it. Thereupon it demanded that the Public Service Corporation should supply to it at the end of the pipe at the top of every lamp-post in Jersey City, enough gas to run the lamp at the regular rate for measured gas as supplied to householders generally in Jersey City. Vice-Chancellor Pitney disposed of this case upon a number of points, one of them being this:

"I am entirely of the opinion that the defendant, the lighting company, has no standing whatever, in its own right, to demand from the complainants a supply of gas. For the simple reason, above stated, that it is neither a householder nor a resident of Jersey City, and the obligation which is imposed upon complainants by reason of their enjoyment of a public franchise of laying mains in the streets, to furnish gas, extends only to residential citizens of the city and to the municipality. It is quite absurd to say that any person who might happen to be walking along the street and yet be destitute of any local habitation within the corporate limits of Jersey City has the least right to demand a supply of gas from the complainants."<sup>1</sup>

It is common knowledge that as the modern telephone system is managed, one of the services offered is to subscribers at their residence. This being so, a telephone company cannot refuse to take on an applicant for house service even if it is shown that there is a pay-station, open to the public in general, near by. Still less could a telephone company do what it attempted to do in one case,<sup>2</sup> insist that an occupier should be content with a pay-station. As the court said:

"To conduct the business of the telephone by public telephone stations, and sending messengers to notify persons with whom a patron of the company desires to converse in other parts of the city; to compel the persons desiring to converse with others to remain at the public telephone station until the persons with whom they desire to converse can be notified, and so arrange their business as to leave and go to another telephone station and hold the conversation, — renders the use of the telephone almost worthless. It is by reason of the fact that business men can have

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<sup>1</sup> In *Provident Inst. for Savings v. Allen*, 37 N. J. Eq. 36 (1883), it was held that water rates cannot be assessed against vacant lots.

<sup>2</sup> *Central Union Telephone Co. v. State*, 118 Ind. 194 (1888).

them in their offices and residences, and, without leaving their houses or their places of business, call up another at a great distance, with whom they have important business, and converse, without the loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce."

### VIII.

According to this analysis the occupiers of every house within the territory served have the right to be supplied. The exact nature of this duty is well set forth in a leading case<sup>2</sup> where the relator, a tenant of a building, was refused service by the water company upon the ground that the company had decided that it would deal only with the owners of premises. But the court — Mr. Justice Hunt writing the opinion — held that the tenant must be served:

"The relator is an inhabitant of Butte, occupying premises wholly without water for general use, and there are no other means by which water for his house may be secured, except from the appellant corporation. Ought the appellant to be allowed to refuse his tender for water in advance, and to refuse him water, upon the ground that, 'by virtue of its rules and regulations adopted, it can deal only with the owners of the property requiring water to be turned on, or the agents of said owners'? We say not. It has no power to abridge the obligations, assumed by it in accepting its franchise, to supply an inhabitant of Butte with water, if he pays them for it in advance, and is a tenant in the possession and occupancy of a house, in need of water for general purposes."<sup>3</sup>

In accordance with this doctrine the owner of the premises has no standing to complain of the refusal to supply his tenant.<sup>4</sup> It follows that the owner of the premises cannot be held liable for the bills of his tenant,<sup>5</sup> nor can his premises be subjected to any lien for such charges.<sup>6</sup> And, similarly, a new tenant cannot be affected by the

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<sup>1</sup> *Accord.*, *Central Union Telephone Co. v. State*, 123 Ind. 113 (1889).

<sup>2</sup> *State v. Butte City Water Co.*, 18 Mont. 199 (1896).

<sup>3</sup> The following cases, among others, involve the doctrine that the duty is primarily owed to the occupier: *McCrary v. Beaudry*, 67 Cal. 120 (1885); *McCarthy v. Humphrey*, 105 Iowa 535 (1898); *Vanderberg v. Gas Co.*, 126 Mo. App. 600 (1907); *Jones v. Rochester Gas & El. Co.*, 168 N. Y. 65 (1901).

<sup>4</sup> *Brass v. Rathbone*, 153 N. Y. 435 (1897). See also *Stein v. McArdle*, 24 Ala. 344 (1854).

<sup>5</sup> *McCarthy v. Humphrey*, 105 Iowa, 535 (1898).

<sup>6</sup> *Turner v. Revere Water Co.* 171 Mass. 329 (1898).



arrears of a prior tenant.<sup>1</sup> This is all good common-law doctrine; but it may be, and sometimes is, altered by the legislature by general statute or by provision in particular charters.<sup>2</sup> Such legislation is not unconstitutional as subjecting one person to the debts of another.<sup>3</sup> In meeting this contention the Minnesota court said recently:

"The theory of the charter is that the obligation on the part of the owner rests upon contract, which is implied by the fact that he connects his premises with the city water or electric light system and permits the occupant to use the same. It is quite as reasonable to require the owner of the premises to respond personally for the debts incurred by his lessee for electric light and water rent as to subject his premises to a lien and sale."<sup>4</sup>

The decision that a tenant, as such, is entitled to demand service does not altogether exclude the landlord from consideration.<sup>5</sup> He has such interest in the supply of the premises that it would seem that he could frame an action for injury to his interest by refusal of the company to furnish a supply to them. On some such ground as that the legislation making the owner liable for supply to his premises may better be justified than in any other way.<sup>6</sup> A mortgagee in possession has of course the same rights as an occupier to complain of refusal to give service; but it has been held that even a mortgagee out of possession may maintain an action for depreciation of his security by a refusal of service to his mortgagor.<sup>7</sup> Of course if the mortgagor is in possession he is the one entitled to service.<sup>8</sup>

## IX.

The primary duty is thus to the occupier of premises as such; and the curtilage therefore is the unit. The company may insist

<sup>1</sup> Gaslight Co. v. Colliday, 25 Md. 1 (1866).

<sup>2</sup> Kelsey v. Fire & Water Commissioners, 113 Mich. 215 (1897); Jersey City v. Morris Canal & C. Co., 41 N. J. L. 66 (1879).

<sup>3</sup> East Grand Forks v. Luck, 97 Minn. 373 (1906).

<sup>4</sup> Lien with possible sale was held constitutional in United States Provident Institution for Savings v. Jersey City, 113 U. S. 506 (1885); Wagner v. Rock Island, 146 Ill. 139 (1893).

<sup>5</sup> Dayton v. Quigley, 29 N. J. Eq. 77 (1878).

<sup>6</sup> See Pallett v. Murphy, 131 Cal. 192 (1900).

<sup>7</sup> Equitable Securities Co. v. Montrose & D. Canal Co., 20 Colo. App. 465 (1905).

<sup>8</sup> Mabb v. Stewart, 133 Cal. 556 (1901).

upon this as well as the applicant. Thus in one leading case<sup>1</sup> the United States as owner of a military reservation at Fort Omaha demanded that all the water supplied should be sold at wholesale rates through one meter. But the court held that the company could insist upon supplying each building separately, saying that this was the nature of their undertaking. There are, however, some instances of service arranged for a group as a unit, which, it is held, will conclude the parties to the arrangement if any of them are later dissatisfied.<sup>2</sup>

It is of interest to see how the problem is handled in accordance with these principles when the basis of supply to a building occupied by several groups of persons is brought in question. If there are various persons occupying the premises, but no separation of the tenancy, the premises must be considered as an entirety. A single charge may then be made for all; one lodger cannot demand separate rating when the premises are used to some extent in common with a single system of piping.<sup>3</sup> It may be added that where the statute permits the charging of the service against the owner the whole may be billed to him, leaving him to deal with his tenants as he sees fit.<sup>4</sup> But generally where the building is divided into separate tenements, there being separate lessees of these apartments, a different situation is presented. Even then it is not the duty of the supplying company to provide rising pipes to each apartment and a meter for the supply at each. As a theoretical matter the profession of the supplying company, a gas company or a water company for example, ends at the cellar wall by its usual practice. Moreover, as a practical matter, the existence of public pipes within the house structure would give too great an opportunity for stealing by tapping the pipes.<sup>5</sup> The proper method for application by a tenant who desires a supply is by bringing his own service pipes to the cellar wall and there requesting that a supply be handed over to him.<sup>6</sup> These difficulties doubtless do not apply to electric supply

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<sup>1</sup> *United States v. American Water Works Co.*, 37 Fed. 747 (1889). Compare *Haugen v. Albina L. & Water Co.*, 21 Ore. 411 (1891).

<sup>2</sup> *Helphery v. Perrault*, 12 Ida. 451 (1906); *Mulrooney v. Obear*, 171 Mo. 613 (1903).

<sup>3</sup> *Birmingham v. Birmingham Water Works Co.*, 152 Ala. 306 (1906). See also *Frothingham v. Bensen*, 20 N. Y. Misc. 132 (1897).

<sup>4</sup> *Kelsey v. Board of Fire & Water Commissioners*, 113 Mich. 215 (1897).

<sup>5</sup> *Ferguson v. Metropolitan Gas Co.*, 37 How. Pr. 189 (1868).

<sup>6</sup> The lessee of two tenements is not liable for supply to his sub-lessee in one. *Young v. Boston*, 104 Mass. 95 (1870).



or telephone service, unless perhaps when the wires are under ground; for when the wires are overhead they may be brought directly to the outer wall of the apartment.

## X.

As has just been seen, special limitations upon the extent of the particular employment may be justified by the situation with regard to the service in question. This is certainly true when those who may demand service are plainly limited by external forces. Where it is true that only a certain class can be in a position to demand service the propriety of confining service to that class is obvious. These external limitations may be of various sorts, as will be seen. The service in question may be so dependent upon another service that it may only deal with those who have been first accepted by this other service. Or the service in question may be available only to those who have first acquired a legal right entitling them to this service. An illustration of each of these two possibilities will bring this out.

The public profession and proper obligation of a sleeping car or parlor car company is subject to this sort of limitation. Its services are tendered, not to all persons who may desire shelter or protection but only to passengers on the train to which they are attached, and indeed only to such passengers as the carrier permits to ride in the cars of the company. As Mr. Justice Devens said, in *Lawrence v. Pullman Palace Car Company*:<sup>1</sup>

"The defendant company could not certainly furnish a berth in its cars until the person requesting it had become entitled to transportation by the railroad company as a passenger, and he must also be entitled to the transportation for such routes, distances, or under such circumstances, as the railroad company should determine to be those under which the defendant company would be authorized to furnish him with its accommodations. The defendant company could only contract with a passenger when he was of such a class that the railroad company permitted the contract to be made."<sup>2</sup>

Legal limitation is the true explanation of the restricted obligation attributed to the wire conduit companies by the few cases which

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<sup>1</sup> 144 Mass. 1 (1887).

<sup>2</sup> *Lemon v. Pullman P. C. Co.*, 52 Fed. 262 (1887); *Pullman P. C. Co. v. Lee*, 49 Ill. App. 75 (1892).

deal with this modern instance. It is held as to them that they are only bound to admit the wires of such companies as have received proper franchise from the public authorities to engage in their business along the streets in which the conduit is run.<sup>1</sup> This "lawful power" is a condition prerequisite, otherwise the various companies might foist themselves upon the city without its consent.<sup>2</sup>

## XI.

Citations might have been multiplied upon the topics here discussed; but it is hoped that authority enough has been adduced to support the contention here put forward. It is but a half truth that those who commit themselves to a public employment are bound to serve the whole public. It is but a half truth, that the public servant may altogether decide as to the extent to which he will commit himself to public service. The real truth in this is, that by entering upon the service one comes within the law requiring him to meet the necessities of the situation, — but no more. The obligations are thus the involuntary ones of a legal status, — not the defined ones of a specific assumption.

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<sup>1</sup> See generally *State ex rel. v. National Subway Co.*, 145 Mo. 551 (1898); *West Side Electric Co. v. Consol. T. & E. Co.*, 110 N. Y. App. Div. 171 (1905).

<sup>2</sup> See particularly *Purnell v. McLane*, 98 Md. 589, 56 Atl. 830 (1904); *Re Long Acre Light & Power Co.*, 102 N. Y. Supp. 242 (1907).



## THE FEDERAL ANTI-TRUST ACT.

THE purpose of this article is to state the legal meaning of the Sherman Anti-Trust Act as laid down by the Supreme Court of the United States, and then in the light of that meaning to consider briefly the possible future development of the law, whether by further judicial interpretation or by legislation.

The vital words of the Anti-Trust Act are found in the first two sections and are as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal. [Such acts are made criminal and penalties are provided.]

"SECTION 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor and . . . [Penalties are provided]."

## I.

The first fact to be noted is that the words quoted above have meant very different things to different individuals. They signified one thing to the framers of the law;<sup>1</sup> another to the judges who composed the Supreme Court in 1897;<sup>2</sup> still another to the judges who formed the Court in 1904.<sup>3</sup> Moreover, in eight out of

<sup>1</sup> "Mr. Sherman's bill found little favor with the Senate. It was referred to the Judiciary Committee, of which I was a member. I drew as an amendment the present bill, which I presented to the committee. There was a good deal of opposition to it in the committee. Nearly every member had a plan of his own. But at last the committee came to my view and reported the law of 1890. . . . It was expected that the court, in administering that law, would confine its operation to cases which are contrary to the policy of the law, treating the words 'agreements in restraint of trade' as having a technical meaning, such as they are supposed to have in England. The Supreme Court of the United States went in this particular farther than was expected." — *Autobiography of Seventy Years*, George F. Hoar, Vol. II, p. 364.

<sup>2</sup> *United States v. Trans-Missouri Freight Association*, 166 U. S. 290.

<sup>3</sup> *Northern Securities Co. v. United States*, 193 U. S. 197.

the ten leading cases in which this statute has been before the Supreme Court its words have meant one thing to some members of the court and another to other members. This difference of opinion shows clearly that the Anti-Trust Act standing by itself has no precise and easily ascertained meaning. Nearly all of the cases on the statute might have been decided the other way without furnishing clear ground for criticism. Manifestly the interpretation of the Act has been peculiarly a case of judicial legislation. The existing law as to restraints of interstate trade and commerce and the monopoly of the same is judge-made law, and is to be found only in the decisions of the Supreme Court.<sup>1</sup>

The cases are as follows:

1. Jan. 21, 1895 *United States v. E. C. Knight Company*, 156 U. S. 1.
2. March 22, 1897 *United States v. Trans-Missouri Freight Association*, 166 U. S. 290.
3. Oct. 24, 1898 *United States v. Joint Traffic Association*, 171 U. S. 505.
4. Oct. 24, 1898 *Hopkins v. United States*, 171 U. S. 578.
5. Oct. 24, 1898 *Anderson v. United States*, 171 U. S. 604.
6. Dec. 4, 1899 *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 21.
7. Feb. 23, 1904 *Montague v. Lowry*, 193 U. S. 38.
8. March 14, 1904 *Northern Securities Co. v. United States*, 193 U. S. 197.
9. Jan. 30, 1905 *Swift v. United States*, 196 U. S. 375.
10. March 6, 1905 *Harriman v. Northern Securities Co.*, 197 U. S. 244.
11. May 8, 1905 *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U. S. 236.
12. Feb. 3, 1908 *Loewe v. Lawlor*, 208 U. S. 274.
13. Feb. 1, 1909 *Continental Wall Paper Co. v. Voight & Sons*, 212 U. S. 227.
14. April 26, 1909 *American Banana Co. v. United Fruit Co.*, 213 U. S. 347.

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<sup>1</sup> "As between the legislative and judicial organs of a society, it is the judicial which has the last say as to what is and what is not law in a community. To quote a third time the words of Bishop Hoadley: 'Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them.'" — *John C. Gray, The Nature and Sources of the Law*, p. 369.



The whole existing authoritative meaning of the Anti-Trust Act is to be found in these decisions. To state the facts of the cases and the principles, as laid down by the majority of the court, on which they were decided, is necessary to ascertain the law. Three of the cases in the above list are, for the present purpose, of trifling importance, and may be disposed of in a few words.

The *Board of Trade* case held that contracts under which the Board of Trade furnished telegraph companies with its quotations which it could refrain from communicating at all, on condition that they would be distributed only to persons in contractual relations with and approved by the Board, and not to what are known as bucket-shops, were not void at common law or under the Act. In *Loewe v. Lawlor* a combination of trade unionists involving a widely extended boycott was held illegal. The case is important only as giving a broad meaning to the words "interstate commerce." In the *United Fruit Co.* case it was held that the prohibitions of the Act do not extend to things done in foreign countries, even though done by citizens of the United States and injuriously affecting other citizens of the United States. The remaining cases must be dealt with in greater detail.

*The Knight Case.*<sup>1</sup> The American Sugar Refining Company bought, in exchange for its own shares, all the stock of four Pennsylvania corporations engaged in the business of refining sugar. At the time of the purchase these four companies were in active competition with each other and with the American Sugar Company. Of the sugar refined and sold in the United States about thirty-three per cent came from the four Pennsylvania companies before they sold out; afterwards about ninety per cent came from the American company. The charter of this company empowered it to sell sugar as well as to refine it.

It was held that while the transaction constituted a successful attempt to monopolize the manufacture of sugar, it affected interstate commerce only indirectly if at all, and was therefore not covered by the Anti-Trust Act.

Fuller, C. J., delivered the opinion, in the course of which he said:

"That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state." P. 12.

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<sup>1</sup> 156 U. S. 1.

"Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce." P. 12.

"The contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations." P. 17.

The above sums up the reasoning by which the transaction was declared to be not directly in restraint of interstate trade. Upon a point which in later cases became the main issue, the court said:

"The subject matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce." P. 17.

Field, Gray, Brewer, Brown, Shiras, Jackson, and White, JJ., concurred. Harlan, J., delivered a vigorous dissenting opinion, in the course of which he made the following striking remarks:

"It is said that manufacture precedes commerce and is not part of it. But it is equally true that when manufacture ends, that which has been manufactured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation and are as much commercial intercourse, where articles are bought to be carried from one state to another, as is the manual transportation of such articles after they have been so purchased." P. 35.

"While the opinion of the court in this case does not declare the Act of 1890 to be unconstitutional, it defeats the main object for which it was passed. For it is, in effect, held that the statute would be uncon-



stitutional if interpreted as embracing such unlawful restraints upon the purchasing of goods in one state to be carried into another state as necessarily arise from the *existence* of combinations formed for the purpose and with the effect, not only of monopolizing the ownership of all such goods in every part of the country, but of controlling the price for them in all the states." P. 42.

"Now the *mere existence* of a combination having such an object and possessing such extraordinary power is itself, under settled principles of law, — there being no adjudged case to the contrary in this country, — a direct restraint of trade in the article for the control of the sales of which in this country that corporation was organized." P. 44.

*The Trans-Missouri Freight Case.*<sup>1</sup> On March 15, 1889, fifteen competing railroad companies entered into an agreement the preamble of which was:

"For the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, and agree to be governed by the following provisions."

Then follow articles which provide for the election of a chairman, a representative of each company, a committee to establish rules, rates and regulations, and monthly meetings. Violations of the agreement were to be punished by majority vote of managers, each fine not to exceed \$100.

On January 6, 1892, the United States instituted proceedings by a bill in equity. The prayer was that the Association be dissolved and that the defendants be each restrained from further agreeing, etc., as to rates.

It was held (1) that the Anti-Trust Act was not inconsistent with the Interstate Commerce Act of 1887 and that both statutes were law; (2) that the Anti-Trust Act applied to railroads; (3) that even reasonable contracts by railroads restraining interstate trade were forbidden by the Act; (4) that the contract or transaction before the court did restrain interstate trade directly though reasonably.

Peckham, J., delivered the opinion. He apparently had some difficulty in bringing railroads within the Act, but once he had done so, he implied that they were rather *more* subject to the Act than ordinary business enterprises. In the course of the opinion he said:

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<sup>1</sup> 166 U. S. 290.

"The language of the Act includes *every* contract, combination, . . ."  
P. 312.

"Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the Act plainly and in terms covers, all contracts of that nature?"  
P. 327.

He adopted the latter construction and denied that the words "contract in restraint of trade" have legally a technical meaning signifying "in unreasonable restraint of trade." The phrase was held to cover all contracts which as a matter of fact restrain trade, though it was agreed that at common law only such as are unreasonable are invalid. Perhaps the most remarkable part of the opinion is the *dicta* concerning the evils of combinations of capital. He said:

"It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital." P. 323.

Fuller, C. J., Harlan, Brewer, and Brown, JJ., concurred.

White, J., with whom Field, Gray, and Shiras, JJ., concurred, delivered a dissenting opinion, taking the ground (1) that the Act



did not apply to railroads; (2) that if it did, the only sensible construction was that the words "contracts in restraint of trade" should be given their technical meaning signifying unreasonable restraint. In the course of his opinion he said:

"I commence, then, with these two conceded propositions, one of law and the other of fact, first, that only such contracts as unreasonably restrain trade are violative of the general law, and second that the particular contract here under consideration is reasonable, and therefore not unlawful if the general principles of law are to be applied to it." P. 344.

*Joint Traffic Association Case.*<sup>1</sup> This case represented an attempt to secure a reversal of the Trans-Missouri case, although counsel for the railroads claimed the two cases were not precisely alike. Thirty-one railroad companies had formed an association. The affairs of the association were to be managed by several boards, and the association had jurisdiction over all competitive traffic, with certain exceptions, which passed through certain places and such other places as might thereafter be designated by the managers. It was provided that the powers conferred upon the managers should be so construed and exercised as not to involve violation of the Interstate Commerce Act, and that the managers should coöperate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, and charges.

The managers were charged with the duty of securing to each company equitable proportions of the competitive traffic so far as this could be legally done. Joint freight and passenger agencies might be organized. Agencies for soliciting passengers or freight were not to be maintained by the separate companies except with the approval of the managers. Violations of the agreement were to be subject to fine of not over \$5,000. The agreement was to take effect January 1, 1896, and continue five years.

A bill was filed by the United States for the purpose of having the agreement declared illegal and its further execution enjoined.

It was held (1) that the facts were not to be distinguished from those in the Trans-Missouri case; (2) that the decision in the Trans-Missouri case was right, and the same was affirmed; (3) that the Fifth Amendment of the Constitution providing that "No person shall be . . . deprived of life, liberty, or property without due pro-

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<sup>1</sup> 171 U. S. 505.

cess of law," did not have the effect of rendering unconstitutional the Anti-Trust Act as construed by the court.<sup>1</sup>

The opinion was delivered by Peckham, J. He agreed with counsel that competition and commerce are not identical.

On the constitutional question he agreed that "liberty" includes the right to make proper contracts, but stated that the question was whether under the interstate commerce clause of the Constitution Congress had power to declare illegal, contracts like the one before the court. He held that it had. In the course of the opinion he said:

"It was considered in the other case that the rates actually fixed upon were reasonable, while the rates fixed upon in this case are also admitted to be reasonable." P. 565.

"The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce. If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned." P. 569.

In reference to the contention of counsel that the Act as construed would cover practically all commercial activities, he said:

"Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade." P. 567.

"The effect upon interstate commerce must not be indirect or incidental only." P. 568.

"To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court." P. 568.

Fuller, C. J., Harlan, Brewer, and Brown, JJ., concurred. Gray, Shiras, and White, JJ., dissented but delivered no opinion. McKenna, J., took no part in the decision.

*The Hopkins Case.*<sup>2</sup> The defendants in this case were commission

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<sup>1</sup> This constitutional question was not argued in the *Trans-Missouri* case.

<sup>2</sup> 171 U. S. 578.



merchants, members of a voluntary unincorporated association known as the Kansas City Live Stock Exchange. The Exchange admitted to membership any reputable person who was willing to be bound by its rules. The association itself did no business. The members received, as commission merchants, at the Kansas City stockyards, which was an open market owned by a separate corporation, large numbers of cattle, hogs, and sheep shipped from many of the western states, and sold them to various packing houses and persons of other states. The rules of the Exchange provided a scale of rates; prohibited the employment of more than three solicitors; and forbade members to send prepaid telegrams except to actual shippers or persons desiring to make purchases. There was competition among the members with one another, but members refused to deal with non-members. The Kansas City stockyards were freely used by non-members of the Exchange.

The United States filed its bill for the purpose of obtaining a dissolution of the Exchange and an injunction forbidding its members to enter into or continue any combination of like character.

It was held that the transaction was not within the Anti-Trust Act because the defendants were not engaged in interstate commerce, and their agreements did not restrain such commerce, and affected it only in a negligible degree. Peckham, J., delivered the opinion. The basis of the decision is expressed in the following words:

"On the contrary, we regard the services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce." P. 588.

The reasoning of the opinion as to the by-laws forbidding the sending of telegrams and limiting the number of solicitors to be employed is not quite convincing. It would seem that these might have been held to be contracts restraining interstate trade if they had stood alone. The court considered them as merely incidental to a business which was not interstate commerce. Whether the refusal to transact intrastate business with non-members was justifiable was not pertinent to the issue and the court declined to consider it. In the course of the opinion Peckham, J., said:

"There must be some direct and immediate effect upon interstate commerce in order to come within the act." P. 592.

"The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements." P. 600.

Fuller, C. J., Gray, Brewer, Brown, Shiras, and White, JJ., concurred.

Harlan, J., dissented but delivered no opinion. McKenna, J., took no part in the decision of the case.

*The Anderson Case.*<sup>1</sup> The defendants in this case were members of a voluntary unincorporated association known as the Traders' Live Stock Exchange. They were not commission merchants, but themselves bought, sold, and speculated in cattle. They were what was known as "yard traders" and did business at the Kansas City stock-yards, the same public market that appeared in the Hopkins case. The rules and by-laws of the Exchange forbade members to deal with yard traders who were not members, or with commission merchants who dealt with such yard traders. The Exchange did no business itself, and its members competed with one another and with such outside purchasers and sellers as were not yard traders; that is, with representatives of packing houses and others who bought to keep. Any reputable yard trader who was willing to be bound by its rules could join the Exchange.

It was held that the agreements as evidenced by the rules of the Exchange were not in direct restraint of interstate commerce and therefore not within the Act. Peckham, J., delivered the opinion, in the course of which he said:

"In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act." P. 615.

"There is no feature of monopoly in the whole transaction." P. 614.

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<sup>1</sup> 171 U. S. 604.



The court agreed that the Exchange intended by its rules to compel all yard traders to join it, but said if this affected interstate trade at all it was only "in the most roundabout and indirect manner." Fuller, C. J., Gray, Brewer, Brown, Shiras, and White, JJ., concurred. Harlan, J., dissented but delivered no opinion. McKenna, J., took no part in the decision.

*The Addyston Case.*<sup>1</sup> The six defendant corporations were engaged in the manufacture and sale of iron pipe; one of them was located in Ohio, one in Kentucky, two in Alabama, and two in Tennessee. On December 28, 1894, they entered into an agreement which, as altered by some important changes adopted May 27, 1895, was in effect as follows: A representative board was appointed to which all inquiries for pipe were referred. This board fixed the price at which the pipe should be sold, and then the order was disposed of at an auction pool to that one of the six defendants which bid most for it. A quotation from the minutes of the board shows the precise method in vogue:

"It was moved to sell the 519 pieces of 20" pipe from Omaha, Neb., for \$23.40 delivered. Carried. It was moved that Anniston participate in the bonus and the job be sold over the table. Carried. Pursuant to the motion, the 519 pieces of 20" pipe for Omaha was sold to Bessemer at a premium of \$8."

In addition each defendant had reserved to itself certain cities where it alone could do business. At public lettings those defendants who were not to have the contract put in bids as high as the selected bidder requested. The territory covered by the agreement comprised about thirty states and territories and was known as "pay" territory. The six defendants did the great part of the business in the "pay" territory, although there was some competition. There was active competition in the "free" territory. The records and also admissions of certain defendants showed plainly that an object of the agreement was to raise prices.

It was held (1) that the power of Congress to regulate interstate commerce was not limited to protecting such commerce from the interference of state legislation, but included the right to declare invalid private contracts which restrained such commerce; (2) that the liberty clause of the Constitution must give way to the interstate

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<sup>1</sup> 175 U. S. 21.

commerce clause; (3) that the combination was unreasonable and its result was unreasonable prices; (4) that the combination directly restrained interstate commerce; (5) that the Knight case did not govern the case at bar.

Peckham, J., delivered the opinion, in the course of which he said:

"Any combination among dealers in that kind of commodity, which in its direct and immediate effect forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another state, would in our opinion be one in restraint of trade or commerce among the states, even though the article to be transported and delivered in another state were still taxable at its place of manufacture." P. 246.

Congress "may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce." P. 228.

Referring to the Fifth Amendment he said:

"The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of Congress, because," etc. P. 230.

The weak part of the opinion is the attempt to distinguish the Knight case. On this point the court said:

"The direct purpose of the combination in the Knight case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article, nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another state, was held to be immaterial and not to alter the character of the combination." P. 240.

"It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar in the Knight case — that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at some time to sell, and



possibly to sell in another state; but such sale as we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of or an illegal interference with interstate commerce. That principle is not affected by anything herein decided." P. 246.

Fuller, C. J., Harlan, Gray, Brewer, Brown, Shiras, White, and McKenna, JJ. (all the judges), concurred.

*Montague v. Lowry*.<sup>1</sup> This was an action brought under section 7 of the Anti-Trust Act. This section provides that any person injured in property or business by anything declared to be illegal in the Act may recover threefold damages. The plaintiffs were copartners, dealers in tiles, mantels, and grates. There was an unincorporated association, to which the defendants belonged, known as the Tile, Mantel, and Grate Association of California, the members of which were dealers living and doing business in California and manufacturers located in several of the eastern states. The by-laws of the Association provided among other things the following:

"ARTICLE III, SEC. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.

"SEC. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents or manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel, and Grate Association of California, shall forfeit their membership in the association."

The plaintiffs were not members of the association, and had never asked nor been invited to join it. Their business was injured because they were unable to obtain tiles from the manufacturers at any price, and were obliged to pay the dealers the list price referred to in Article III, which was fifty per cent more than the price at which tiles were sold to members.

It was held that the association was an illegal combination in restraint of trade, and that the plaintiff could recover. Peckham, J., delivered the opinion, in the course of which he said:

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<sup>1</sup> 193 U. S. 38.

"The purchase and sale of tiles between the manufacturers in one state and dealers therein in California was interstate commerce within the Addyston Pipe case." P. 47.

"The agreement, therefore, restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other states, so that they could only be sold to the members of the association, and it enhanced prices to the non-member. . . ." P. 45.

On the objection of the defense that the action of the dealers occurred wholly within the State of California he said:

"The whole agreement is to be construed as one piece. . . . The whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the State of California and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce." P. 45.

Fuller, C. J., Harlan, Brewer, Brown, White, McKenna, Holmes, Day, JJ. (all the judges), concurred.

*The Northern Securities Case.*<sup>1</sup> On November 13, 1901, the Northern Securities Company was organized under the laws of New Jersey with a capital stock of \$400,000,000. Its charter empowered the company, among other things, "To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation, corporations, association or associations of the State of New Jersey or of any other state, territory or country, and while owner of such stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon."

The real object of the organization was that the Northern Securities Company should become the holder of the stock of the Great Northern and Northern Pacific Railroad Companies. These companies had in the past been in active competition. A struggle for the control of the latter company between Messrs. Morgan and Hill on one side and Mr. E. H. Harriman on the other was the direct and compelling reason for the formation of the Securities Company. Stockholders of the two companies were offered the right to exchange their stock for that of the Securities Company, or to sell their stock to that company. By one method or another the Securities Com-

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<sup>1</sup> 193 U. S. 197.



pany acquired the title to substantially all of the stock of the Northern Pacific Company and to a majority of the stock of the Great Northern Company. In the neighborhood of \$42,000,000 was expended by the Securities Company in the purchase of stock and the acquisition of Northern Pacific bonds, which it converted into stock of that company. There was no combination other than that resulting from this stock ownership; that is, there were no contracts or agreements of any kind between the Northern Pacific and Great Northern Companies.

It was held that the Northern Securities Company was a combination in restraint of interstate trade and illegal under the Anti-Trust Act. The opinion of the court was delivered by Harlan, J. He reviewed the previous decisions of the court and stated that they had established the following propositions:

That the Act is not limited to unreasonable restraints of trade, but embraces all direct restraints.

That railroads are embraced by the Act.

That private manufacturers and dealers are embraced by the Act.

That Congress has prescribed the rule of free competition among those engaged in interstate commerce.

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce.

That to bring a combination within the Act it is not necessary to show that it results or will result in a total suppression of trade, but only that by its necessary operation it tends to restrain interstate trade or commerce and to deprive the public of the advantages that flow from free competition.

That the Act is constitutional.

With reference to the objection chiefly relied on by the defendants that there was no combination but only the acquisition and ownership of stock by a corporation legally organized and existing under state laws he said:

"There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in

the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose . . . the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company in whose hands, not as a real purchaser or absolute owner, but simply as a custodian, were to be placed the stocks of the constituent companies — such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being as already indicated, to restrain and monopolize interstate commerce by suppressing or . . . ‘smothering’ competition between the lines of two railway carriers.” P. 353.

Brown, McKenna, and Day, JJ., concurred in the decision and opinion. Brewer, J., concurred in the decision but delivered an opinion in which he deplored the broad language used by the court. He felt that the prior cases holding certain combinations illegal should be sustained on the ground that the restraints in question were unreasonable; that the rule of law should be that reasonable restraints were not covered by the Act. As to the form of the combination in the case at bar he said:

“A corporation, while by fiction of law recognized for some purposes as a person, and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully destroy trade was carried out.” P. 362.

White, J., with whom Fuller, C. J., and Peckham, J., concurred, delivered a dissenting opinion. He also reviewed at length previous decisions of the court and states the following conclusion:

“Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under state law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress.” P. 390.



He further said:

"It is said, moreover, that the decision of this case does not involve the consequences above pointed out, since the only issue in this case is the right of the Northern Securities Company to acquire and own stock. The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. My mind fails to seize the distinction." P. 371.

"True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and ownership of the same property. This difference was pointed out in the cases which have been referred to, and the distinction between the two has been from the beginning the dividing line, demarking the power of the national government on the one hand and of the States on the other." P. 393.

"It has been decided by this court that, as the Anti-Trust Act forbids any restraint, it therefore embraces even reasonable contracts or agreements." P. 373.

Holmes, J., concurred in the main with White, J., but himself delivered a dissenting opinion. This opinion furnishes the clearest and best statement to be found in these cases of one possible and entirely tenable construction of the Act. In the course of the opinion he said:

"Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two, — contracts in restraint of trade, and combinations or conspiracies in restraint of trade." P. 403.

"Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own." P. 404.

"Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm." P. 404.

"A partnership is not a contract or combination in restraint of trade unless the well-known words are to be given a new meaning invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, but, as I have said, that was in connection with a contract with a stranger to the defendants' business, — a true contract in restraint of trade. To suppress competition in that way is one thing, to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone." P. 410.

"I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with intent to exclude strangers to the combination from competing with it in some part of the business it carries on." P. 409.

*Harriman v. Northern Securities Co.*<sup>1</sup> is important only for the light it throws on the meaning of the Northern Securities case. The decision only went so far as to hold that the title to the stocks transferred to the Northern Securities Company had passed as between the parties; but the following statement of Fuller, C. J., is worth noting:

"Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute no matter what the tenure of title was." P. 291.

*The Packers' Case.*<sup>2</sup> This was a bill brought by the United States against several corporations, firms, and individuals of different states.

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<sup>1</sup> 197 U. S. 244.

<sup>2</sup> 196 U. S. 375.



The defendants were engaged in the business of buying livestock at stockyards in Chicago, Omaha, St. Joseph, East St. Louis, and St. Paul, slaughtering livestock in their plants in various states, and selling fresh meat to dealers and consumers and shipping the same throughout the country. The defendants together controlled about six-tenths of the whole trade in fresh meats, and but for the acts complained of, would have been in free competition with one another. The bill charged :

"A combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the livestock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stockyards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors." P. 394.

It was held that the combination was illegal under the Anti-Trust Act.

Holmes, J., delivered the opinion of the court, in the course of which he said :

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful." P. 396.

"Taking up the latter objection first, commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock-yards, and when this is a typical constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce." P. 398.

"The defendants cannot be ordered to compete, but they properly can be forbidden to give directions or make agreements not to compete." P. 400.

Fuller, C. J., Harlan, Brewer, Brown, White, Peckham, McKenna, and Day, JJ. (all the judges),<sup>\*</sup> concurred.

*Wall Paper Case.*<sup>1</sup> The Continental Wall Paper Company, a New York corporation, brought suit against Voight & Sons, an Ohio corporation, to recover \$56,762.10, being balance due on account of merchandise sold and delivered to the defendant. The defense was that the plaintiff was an illegal combination under the Act. Among the facts set out in the answer were the following: The plaintiff corporation was formed to act as selling agent of various persons and corporations who produced upwards of ninety-eight per cent of all wall paper sold and manufactured in the United States. Each firm or corporation which joined in the transaction signed a contract with the Continental Company, agreeing to sell to that company its entire product at certain prices set out in a schedule called "A." They also agreed that the Continental Company should have the right to audit their books. The Continental Company, by refusing to furnish wall paper to such persons or corporations as would not accede to its request, compelled all dealers, both jobbers and wholesalers in wall paper, to sign an agreement that they would buy from no one but members of the combination, and at prices fixed in a schedule called "B." The jobbers were compelled to sign an additional agreement that they would not sell to dealers other than jobbers at prices less than those set out in a schedule called "C." One of the results of the combination was that the price of wall paper very much increased. The defendant had signed one of these agreements, and the merchandise in question was bought at the schedule price. The plaintiffs demurred to this answer.

It was held that the combination was illegal under the Anti-Trust Act, and that the sale in question being part of the illegal scheme the plaintiff was not entitled to the aid of the court. Harlan, J., delivered the opinion of the court, adopting the language of Lurton, J., in the Circuit Court of Appeals.

"The conspiring mills were situated in many states. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every state. Before the combination each of the combining companies was engaged in both state and interstate com-

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<sup>1</sup> 212 U. S. 227.



merce. The freedom of each, with respect to prices and terms, was restrained by the agreement and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details." P. 256.

Fuller, C. J., McKenna, Day, and Moody, JJ., concurred.

Holmes, J., with whom Brewer, White, and Peckham, JJ., concurred, delivered a dissenting opinion. He agreed that the combination was illegal under the Act, but thought that the particular sale in question should stand on its own merits and not as part of the illegal scheme. Brewer, J., also delivered a dissenting opinion taking the ground that the remedies prescribed by the Anti-Trust Act were exclusive.

The decisions soon to be expected in the American Tobacco Company case and the Standard Oil case will afford further enlightenment on the Anti-Trust Act, particularly as regards corporate combinations.

## II.

It is now proposed to state the definitely binding rules of law to be drawn from these decisions. As a general summary the following is ventured: Any combination which directly restrains interstate trade is illegal. Trade is restrained by the ending or limiting of competition among the members of the combination as well as when the business of others is injured; it is not necessary that competition of outsiders be destroyed or affected. The restraint need not be unreasonable. The actual effect of the transaction on prices is not a determining factor; it is sufficient if a power to raise prices is acquired or increased. This power need not be broad enough to cover the whole country; indeed, its possible exercise may embrace only comparatively narrow limits. A "direct" restraint imports not only that the restraint be the proximate result of the combination, but also in some degree substantial. Whether the court will hold any given restraint trifling and negligible or substantial and "direct," there is no rule to determine. A holding company is a combination.

The above seems a broad statement, but it is fairly justified by the

decisions. The minority opinions in the Trans-Missouri case and in the Northern Securities case attribute an even more extended meaning to the decisions of the court. The fact that the majority opinions in several of the cases contain statements disclaiming any intention of covering so wide a field as the principles laid down seem to embrace, does not alter the effect of the actual decisions.

Something by way of definition and comment must be added to give the above summary its complete meaning.

Interstate commerce includes both transportation between states and also the purchase and sale of commodities that are expressly intended to be carried from one state to another, or which, from the inevitable logic of facts, must be taken to be so intended. The Knight case, for all practical purposes, must be held to be overruled by the Addyston case. It is impossible for the average mind to distinguish the two. To say that the combination in the Knight case restrained only manufacture is ignoring not the "probable intention," as Judge Peckham called it, on the part of the manufacturer, but the inevitable result of the manufacture by a combination of over ninety per cent of the sugar refined in the whole country.

As there is no rule as to what constitutes a direct restraint, each case stands on its own basis. The Anderson case furnishes an example of a restraint held indirect. Looking at the whole transaction, the court could properly say that the Traders' Live Stock Exchange was not a combination in restraint of trade, but a combination to carry on a certain business in a convenient and orderly manner. If the restraint is direct, the fact that it is reasonable is of no avail. The decisions in the Trans-Missouri Freight case and in the Joint Traffic case expressly decide that even a reasonable restraint of interstate commerce is invalid under the Act. In both the majority and minority opinions in the former case, the reasonableness of the restraint in question was expressly accepted as a fact. In the Northern Securities case this principle, laid down in the Freight cases, was recognized as law by all the judges with the exception of Brewer.

The Northern Securities case stands squarely for the proposition that a combination effected by means of a holding company formed for the purpose of exchanging its stock for the stock of the companies combined is illegal under the Act. The court looked through the form and discerned the combination. The case does not in terms decide that it is invalid for one corporation *bona fide* to buy out another



by acquisition of its stock. It leaves untouched the further question of the legality of a combination which acquires title to the tangible property of the companies combined. The reasoning of the decision, however, seems to be broad enough to cover any corporate combination when combination is the vital feature of the transaction.

Whether a combination depends for its success on the real economic values lying in the fact of combination or merely on its power to control the situation is, under the law, immaterial. The best possible trust, if it represents a combination, is illegal.

In concluding this comment on the law as actually laid down by the court one important fact is to be noted. The second section of the Act prohibiting monopolies and attempts to monopolize has received no adequate interpretation, and practically no interpretation at all. It is hardly mentioned except in the Northern Securities case. No combination has been held to fall under the second section unless it was first declared to be illegal under the first section. In the future it may be possible for the court to hold a given corporate combination not included under section 1 because not technically a combination at all; at the same time deciding it to be a monopoly for reasons the nature of which existing decisions in no way indicate. This possibility furnishes the only discernible way in which new construction of the Act may be attained without additional legislation.

### III.

On the principles as laid down above it appears not only possible but probable that every great combination in the country is liable to prosecution and dissolution under the Anti-Trust Act. This seems fairly certain as to those combinations maintained by means of holding companies, and may include those which hold by direct title the plants of the companies combined.

Clearly as this conclusion follows from the decisions discussed, it involves such tremendous practical consequences as to be accepted only with extreme reluctance. Moreover the fact itself is extraordinary. How business and law have got into what it is little exaggeration to call an *impasse*, deserves an attempt at explanation. For more than thirty years the compelling force in the business evolution of the country has been a tendency of separate interests to combine. Practically co-extensive in point of time has been an ever increasing

hostility to great combinations of capital on the part of the general public. This persistent feeling of antagonism against the trusts, in 1890 took definite form in the enactment of the Anti-Trust Act. The statute was a piece of trial legislation, a shot into the air; but it was a shot of sweepingly wide range. Unless given a technical meaning, the words of the Act are broad and undefined. It was open to the court to give them an exceedingly comprehensive meaning. By a narrow construction the Act could be limited to such transactions as at common law would fall under the head of technical contracts or combinations in restraint of trade; by a broader construction it could be held to cover all the looser forms of combinations; by a still broader construction it could be made to prohibit anything which was in effect and fact a combination whatever its form. The determination that great combinations should not be allowed to exist, which, to borrow an expression from Holmes, J., "somehow breathes from the pores of the Act," could through interpretation of the court become law.

The best and clearest exposition of the Act, as prohibiting all looser forms of combination, is to be found in the dissenting opinion of Holmes, J., in the Northern Securities case. Its effect, as thus construed, is to drive combinations into the corporate form; a form in which they can be dealt with definitely.

As a matter of fact this was for many years the chief practical result of the Anti-Trust Act. Until the decision in the Northern Securities case it was the generally accepted belief among lawyers that the construction adopted by Holmes, J., in that case was law; in other words, that a combination in the form of a corporation was valid under the Act. This belief rested on the well-known principle of general law that a corporation is an entity. The process of looking through the corporate form and dealing with what that form shelters is of recent growth. Moreover, with one notable exception every case under the Act was concerned with a loose combination in which independent identities were maintained. The exception was the Knight case, the first great case under the statute, which dealt with a combination in corporate form. There it was held that the combination in question was not covered by the Act. It is interesting to note, however, certain facts connected with these decisions which might have lessened the confidence of lawyers as to the validity of the corporate combination. The decision in the Knight case was rested wholly on



the point of interstate commerce. There is only a *dictum* by Fuller, C. J., expressing a doubt as to the possibility of remedy in the case of a real fusion. In later cases, where attempts were made to distinguish the Knight case no stress was laid on the fact that the combination in that case was in corporate form.

Whether the generally accepted belief was justified or not, there is no question as to what actually occurred. Many, if not most, of the great corporate combinations in the country were formed between the time of the decision in the Knight case and that in the Northern Securities case. Combination by agreement ceased. Combination by fusion took its place. Meanwhile hostility to the trusts persisted and increased. Public opinion was opposed to combinations in their looser forms. It was equally antagonistic to them in the corporate form. Public opinion has unquestionably been reflected in the decisions of the Supreme Court. Through the decision in the Northern Securities case the wide view of the Act also became law. The Northern Securities case struck a severe blow at the corporate combination. It marked a new era. In view of the fact that combinations to-day, practically without exception, take the corporate form, the importance of this decision transcends that of all the other cases put together. Nevertheless, the old belief persisted to a greater or less extent. What was of more practical importance, the government showed no disposition to enforce the law as thus newly construed against the many corporations which might fall within its prohibitions. The Attorney-General of the United States is reported to have said soon after that decision, "The government will not run amuck." It has not done so. The tremendous significance of the American Tobacco Company and Standard Oil Company decisions in the United States Circuit Courts lies in the message conveyed that the law is to be enforced rather than in any addition to existing law.

#### IV.

It can hardly be endured that the law remain in its present state. The logic of events is certain to bring about a change either by continued judicial construction or by legislation. The enlightened and modern view of the trust problem is that it is an economic question. The changed social relations objected to by Peckham, J., in the Trans-Missouri Freight case are now accepted by most persons, in the same

spirit that changes due to the introduction of machinery were accepted, — as inevitable. The remediable evils are economic evils. The principle of combination is inherently sound. It is based on the familiar maxim "In union there is strength." Properly applied, the principle means progressive commercial methods and results in better service and lower prices. The real evil of the trusts, it is now generally believed, consists merely in monopoly control; that is, in the power of a combination to do as it pleases. This is by no means a necessary accompaniment to the fact of combination. Nor is the dissolution of existing combinations or the prohibition of new ones required to eradicate or prevent this evil.

The law must strike not at the principle of combination but at *monopoly* control. How the evil of monopoly control will be dealt with eventually it is not pretended to prophesy. Public service companies and ordinary industrial corporations stand on wholly different grounds and must be treated differently. The following suggestions apply only to the latter. The obvious and direct method of proceeding, the method which, it is generally believed, should be first tried, is to render great combinations fairly susceptible to competition. This does not mean that fictitious competition should be instigated or sustained. It means only that actual and *bonâ fide* competition should be given opportunity to enter the field, and that when it has done so it should be fought only by fair and proper methods. To this end adequate publicity should be given to corporate affairs, and combinations should be forbidden to fight competitors by lowering the selling price in one part of the country to kill off local competition, while maintaining prices elsewhere; by refusing to deal with persons who are competing or intending to compete or who refuse to accept restrictive terms; and generally by discriminations of one sort or another. Under a law with such provisions a combination would be fairly subject to competition actual or potential. If subject to such competition the remediable evils of the trusts would disappear. Competition, whether it be actual or potential, and monopoly control are a contradiction in terms and the two cannot exist together.

In preparing the way for the required change, the Anti-Trust Act has performed a tremendously valuable service. There still remains work for it to do. The Act, in so far as it covers loose combinations, is a piece of final and complete legislation. The looser forms of combination cannot be definitely handled; the cor-



porate form can be. Section 2 of the Act, by judicial construction which shall lay down definite rules, may become a useful piece of legislation prohibiting vicious attempts to acquire a monopoly, whether by combination or otherwise. Section 1, however, in so far as by interpretation of the Supreme Court it renders illegal corporate combinations which merely terminate competition among the combining members, is not enlightened legislation. As so construed it can be useful, if at all, only as a club to compel voluntary acceptance of legislation which shall be enlightened, hardly a dignified function for a law to be called upon to perform, but perhaps, as a practical matter, necessary. Obviously judicial construction can hardly be expected to cover the ground wholly and finally, even with the freest use of that convenient fiction, "what Congress must be held to have intended."

The required end can be attained only by legislation of uniform application. A national corporation law, such as is recommended by the President, seems, from a practical point of view, the only method of accomplishing the desired result. If such a law is held unconstitutional, it would seem to be easier to secure an amendment to the Constitution than to obtain uniform legislation from the forty-six states.

If the broad view of the Anti-Trust Act is extended to combinations formed by acquisition of the tangible property of the companies combined, it should be sufficient if the law provides for voluntary incorporation. Combinations liable to dissolution under the Act would of their own volition incorporate under the national law and submit to its provisions. If not so extended, or if the principle of the Northern Securities case is limited by future decisions, compulsory incorporation would be necessary.

To discuss in detail the law submitted to Congress, which has probably not yet taken its final shape, is beyond the scope of this article. To accomplish its purpose the Act finally passed must contain certain provisions. It must frankly and definitely exempt combinations incorporated under it from the operation of Section 1 of the Anti-Trust Act as construed by the Supreme Court. It should require adequate publicity of corporate affairs; and it should forbid cut-throat competition and other sorts of discriminations undertaken for the purpose of destroying competition.

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## IS THE FEDERAL CORPORATION TAX AN INTERFERENCE WITH THE SOVEREIGNTY OF THE STATES?

AMONG the many arguments with which the constitutionality of the recently enacted Federal Corporation Tax has been assailed is the ingenious suggestion that it is an invasion of the sovereignty of the states.<sup>1</sup> It is urged that "Congress cannot tax the means and instrumentalities employed by the states in exercising their powers and functions any more than a state can tax the instrumentalities similarly employed by the general government," and that "the right to grant articles of incorporation is an attribute of sovereignty belonging to the states, not to the general government." From this line of reasoning is deduced the conclusion that a tax imposed by Congress upon the exercise of the corporate franchise is an interference with the sovereignty of the state granting the franchise and is therefore unconstitutional. By some it has been assumed that the reasoning of that argument was indubitable in itself, and that the answer to it was to be found in its omission to consider the bearing of the federal government's power of regulation of interstate commerce and the power of taxation incident thereto.<sup>2</sup> But ought we not to examine the steps of the argument with a great deal of care before it is sought to maintain the constitutionality of the Act in any such indirect method as by an appeal to the interstate commerce clause?

By the first clause of section 8 of article 1 of the Constitution the Congress is given "power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." The only express qualification or limitation found in the Constitution on the power to levy excise taxes which this clause confers is that contained in the same clause, that "all duties, imposts and excises shall be uniform throughout the United States." There is no other *express* limitation on the

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<sup>1</sup> See article by Charles W. Pierson, *Outlook*, Vol. 93, p. 639 (Nov. 20, 1909).

<sup>2</sup> See editorial comment upon Mr. Pierson's article, *Outlook*, Vol. 93, p. 622 (Nov. 20, 1909).



power of the national government to levy license or excise taxes.<sup>1</sup> The only limitation which has been *implied* by the construction of the courts is that the Congress shall not, in the exercise of the power, prevent or hamper the states in the discharge of their ordinary functions of government.<sup>2</sup> The power being general and the implied limitation being for a specific purpose, to protect the states from an interference with the machinery of their governments, the limitation must not be carried by implication beyond its purpose. Does not the argument against the Federal Corporation Tax as an invasion of state sovereignty involve such an extension of the limitation beyond its object?

That argument must, in the last analysis, rest upon the proposition that the power of the state to create the artificial entity we call a "corporation" is so essential a part of the means and instrumentalities of the state government that any tax in respect of such entity on the part of the federal government is to be regarded as impliedly beyond the general power of the national government to levy excise taxes. This proposition may well be questioned, both on principle and authority.

The creation of the ordinary corporation by the state does not, in substance, involve a grant by the state to the individuals who constitute the corporation of anything more than the right to do the contemplated business, with an exemption from such a personal liability as they would be under if they were to do the same business as partners, and with the further right of continuing the business regardless of the death of any of them. It is true, they are given the right to do the business in the name of the artificial entity, with a resultant right to sue and liability to be sued in the name of this entity. The power to transfer freely the various shares or interests in the business, by means of transfers of shares of the corporation, is also an incidental advantage of the corporate method over that of the partnership. But there is nothing of substance in these incidental matters. The real objects sought and obtained by means of the incorporation are the immunity from the full personal liability which would follow their embarkation upon the enterprise as partners, and the continuity of the business. These privileges or rights are what the state really gives when it grants the right to do business as a corporation.

Is it not irrational to conclude that the right or power of the state

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<sup>1</sup> So. Car. v. U. S., 199 U. S. 437, 451.

<sup>2</sup> *Ibid.*

to accord such privileges as this grant of a corporate franchise proves to be on analysis, is such an inherent and essential part of its governmental functions as to be impliedly protected from any possible incidental effect upon it through the exercise of power given the federal government to levy excise taxes? Whatever may be said of those corporations to which the state grants an integral portion of the public powers or property, given it for the purposes of government itself, such as eminent domain or the right to run a railroad in a street (and of these corporations we shall have a word to say later), it seems perfectly manifest that the state's grant of permission to John Smith, Jacob Jones and myself and our successors to make and sell butter firkins as the "Smith Butter Firkin Co." without a personal liability on any of us for the debts we contract in the enterprise, is not the exercise of such a governmental function as requires the Supreme Court to exempt it from the comprehensive powers of taxation contained in the national Constitution.

The argument under discussion seems to be constructed upon the theory that anything which the state does by way of the creation or regulation of rights in the exercise of its sovereignty, is within the implied limitation upon the nation's general taxing power. This cannot be so, for, carried to its logical conclusion, it would destroy entirely the grant of power to the federal government to levy *any* excise taxes. For example, there can be no shadow of doubt that our right of inheritance, and the right to direct by will how our property shall go after death, are accorded us by the state in the exercise of its sovereignty. Such rights are also entirely regulated by the state. Indeed, the Supreme Court, in sustaining the validity of a state's inheritance tax in respect of a decedent's estate consisting in part of United States bonds, expressly maintained it upon the theory that it was not a tax on the bonds but one on the right of succession, namely, "upon rights and privileges *created* and regulated by the state,"<sup>1</sup> or (as otherwise expressed in the same opinion) "rights *derived from* and regulated by the state."<sup>2</sup> The principle upon which the various inheritance taxes or death duties of the states have been upheld, is that, inasmuch as the state has *given* us the right to will property and to inherit, it can carve out of the gift whatever it wishes to retain for itself.<sup>3</sup> Yet a federal inheritance tax has been

<sup>1</sup> *Plummer v. Coler*, 178 U. S. 115, 135.

<sup>2</sup> *Ibid.*, p. 137.

<sup>3</sup> *Matter of Estate of Swift*, 137 N. Y. 77, 84.



held to be within the power of the Congress, by a decision of the Supreme Court unanimous on this point.<sup>1</sup> The same contention was made in that case, in respect of the state's right to grant and regulate the devolution of property upon death, as is now made concerning the state's right to grant and regulate the incorporation of companies. But Mr. Justice White answers the contention most ably in these words:<sup>2</sup>

"But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the state to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate."

The learned judge then goes on to demonstrate that if the nation or the state were to be denied the right to levy taxes in respect of objects subject to exclusive regulation by the other, many acknowledged objects of taxation would be withdrawn from each, concluding with this forceful demonstration:<sup>3</sup>

"Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty."

Paraphrasing Judge White's language first quoted, the Corporation Tax is "not upon the state's exclusive right to create and regulate corporations, but upon the *exercise* by the corporation, of the right, when granted, to do business in the corporate capacity." In other words, the state's right to create and regulate the corporation is not taxed or interfered with; the nation only says to the corporation: "If you do business in this artificial, corporate capacity, you must pay this special excise tax to the federal authorities."

It will not do to retort that this incidentally affects and reduces the desirability of incorporation. Precisely that argument was made as militating against the power of the states to tax a devolution on death where the estate consisted in part of United States bonds.<sup>4</sup> It

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<sup>1</sup> Knowlton v. Moore, 178 U. S. 41.

<sup>2</sup> *Ibid.*, p. 59.

<sup>3</sup> *Ibid.*, pp. 59-60.

<sup>4</sup> Plummer v. Coler, 178 U. S. 115, 135.

was argued that such a tax "would operate as a burden upon the borrowing power of the United States." But the court held that any such incidental effect could not be deemed of such importance as to warrant a declaration of want of power in the state to lay the tax in question.

There are some *obiter* remarks in the case of *California v. Central Pacific Railroad Co.*<sup>1</sup> which are not consonant with the views heretofore advanced in this article. These were quoted in the argument under discussion.<sup>2</sup> The court held in that case that the state could not tax the franchises granted to the Central Pacific Railroad Co. by the United States; and, in defining "franchises" and giving examples of them, Mr. Justice Bradley said:<sup>3</sup> "No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise." But the fact was that the Central Pacific Railroad Co. got the right to construct most of its line from the charter granted it by the national government. And the decision, consequently, was that the state could not tax that right which the nation had given. "Franchise" has two meanings: (1) the right to build and operate a railroad (and so to exercise the power of eminent domain), and (2) the mere right to be a corporation. One of the ablest judges of the New York Court of Appeals has called attention to this duality in delivering a very recent decision of that court, in these words:<sup>4</sup>

"It is unquestionably true that the franchise to construct and operate a railroad is different from the franchise to be a corporation."

And another able judge of the same court elaborates the distinction in these words:<sup>5</sup>

"The charter of a corporation is the law which gives it existence as such. That is its general franchise which can be repealed at the will of the legislature. A special franchise is the right, granted by the public, to use public property for a public use, but with private profit, such as the right to build and operate a railroad in the streets of a city."

When either the state or the nation gives to any person or corporation the essentially governmental right of eminent domain, it may

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<sup>1</sup> 127 U. S. 1.

<sup>2</sup> Outlook, Vol. 93, p. 941 (Nov. 20, 1909).

<sup>3</sup> Cal. v. Cent. Pac. R. R. Co., 127 U. S. 41.

<sup>4</sup> City of N. Y. v. Bryan, 196 N. Y. 158, 163, Cullen, Ch. J.

<sup>5</sup> Lord v. Eq. Life Assur. Soc., 194 N. Y. 212, 225, Vann, J.



well be that the grant is to be regarded as one of the "means and instrumentalities employed by the state (or the nation) in the discharge of its ordinary functions as a government,"<sup>1</sup> since the government in such a case uses the person or corporation as a depository of one of the governmental powers put into the government's hands for the benefit of all its citizens. But any immunity from taxation accorded to such a corporation rests, not on the franchise to be a corporation, but rather upon the franchise to build and operate the railroad. The exercise of the latter franchise is not dependent upon the corporate franchise, — indeed, it is quite independent of it, for the franchise to construct and run a railroad may be granted to individuals.<sup>2</sup>

Thus, the decision in the Central Pacific case does not furnish any support to the argument against the power of the Congress to levy an excise tax in respect of doing business as a corporation. Furthermore, it must also be noted, in estimating the effect of that case as a precedent, that the transcontinental railroads (of which the Central Pacific was one) were peculiarly governmental and national in character; they were rendered possible only by the active aid and participation of the federal government. In view of these considerations, it will not do to infer from this *obiter* remark of the court, giving an illustration of a "franchise," that the Supreme Court is going to hold that every grant of a franchise to be a corporation is to be placed in the same category as the franchise to build and operate a railroad, which was the "franchise" involved in the Central Pacific case. Indeed, the doctrine of the later decisions, to which attention has been called, seems to indicate the contrary.

The scope of this article does not permit a review of the cases in which federal taxes have been held invalid on account of interference with state activities or functions; but Mr. Justice Brewer sums them up in so recent an authority as *South Carolina v. United States*, as follows:<sup>3</sup>

"It is also worthy of remark that the cases in which the invalidity of a federal tax has been affirmed were those in which the tax was attempted to be levied upon property belonging to the state, or one of its municipalities, or was a charge upon the means and instrumentalities employed by the state, in the discharge of its ordinary functions as a government."

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<sup>1</sup> *So. Car. v. U. S.*, 199 U. S. 437, 459.

<sup>2</sup> *Village of Phoenix v. Gannon*, 195 N. Y. 471.

<sup>3</sup> 199 U. S. 437, at p. 459.

Nor is it possible, within reasonable bounds of space, to set forth the cases where federal taxes in respect of rights created and regulated by the state have been upheld. The federal "Death Duties" case <sup>1</sup> has been mentioned. Of course, the Spreckels case <sup>2</sup> involves the same proposition, because the state certainly has the exclusive power of regulating the businesses conducted within its borders (apart from the federal interstate commerce power, and the tax under consideration in that case was not based or supported upon that power). *South Carolina v. United States* <sup>3</sup> and the License Tax Cases <sup>4</sup> uphold the power of the federal government to levy a license tax on the sale of liquor. In the *South Carolina* case, the tax was upheld even where the state itself was doing the business. In the License Tax Cases it was expressly held that the power and right of the states to tax, control, or regulate any business was not inconsistent with the power of Congress to tax such business for national purposes. In *Nicol v. Ames* <sup>5</sup> a federal stamp tax in respect of each sale or agreement to sell any products or merchandise at an exchange was upheld. It surely is self-evident that the regulation of such sales is exclusively within the power of the state. Almost all of the stamp taxes which the federal government has imposed from time to time have been in respect of objects within the exclusive regulation of the states. Take, for instance, the stamp required on deeds and mortgages. Of course, the regulations as to the transfer of real property are peculiarly within the exclusive jurisdiction of the state. Yet no one has ever even asserted a want of power in the federal government to levy such taxes.

When we consider the broad, general grant of power to the national government to levy excise taxes, and the decisions and reasoning which have led to and construed an implication of a limitation on it in favor of the "means and instrumentalities employed by the state in the discharge of its ordinary functions as a government," are we not forced to conclude that this present "tax upon the privilege of doing business in a corporate capacity," as it has been denominated, is not open to attack along the line suggested?

It is denominated a "special excise tax" in the Act itself. In view of this and the remarks of the Supreme Court in the Spreckels case: <sup>6</sup>

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<sup>1</sup> *Knowlton v. Moore*, 178 U. S. 41.

<sup>2</sup> *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397.

<sup>3</sup> 199 U. S. 437.

<sup>4</sup> 5 Wall. 462.

<sup>5</sup> 173 U. S. 509.

<sup>6</sup> *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, at p. 411.



"The tax is defined in the act as 'a special excise tax,' and, therefore, it must be assumed, for what it is worth, that Congress had no purpose to exceed its powers under the Constitution, but only to exercise the authority granted to it of laying and collecting excises,"

it would seem difficult to attack the Corporation Tax as something other than what it is legislatively declared to be, notwithstanding the frank avowal of its framers and sponsors that its object was not so much revenue as to bring the corporations under the federal eye and control. Possibly this latter object is within that provision of the first clause of section 8 of article 1 of the Constitution which allows the levying of excises "for the common defense and general welfare of the United States," but it certainly presents some novel aspects. If the *ejusdem generis* principle of construction is applied, the words last quoted would have to be linked to the prior words "to pay the debts," and the whole clause be construed as conferring power to provide only *financial* means "for the common defense and general welfare." But this is a matter quite distinct from the contention that the tax in question is invalid as a clog on the states' "means and instrumentalities of government," and should receive separate consideration.

*John S. Sheppard, Jr.*

NEW YORK CITY.

# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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THIS ISSUE IS DEDICATED AS A MEMORIAL.

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WAIVER BY A MUNICIPAL CORPORATION OF THE RIGHT TO REGULATE RATES. — The regulation of rates charged by public service companies being a governmental function, the power of municipal corporations to exercise it depends, according to the orthodox view, upon legislative sanction.<sup>1</sup> The Supreme Court of the United States has held that where a municipal corporation has received such sanction but has no express authorization to contract as to rates, an agreement by the corporation not to regulate rates may be overridden by a later ordinance reducing them;<sup>2</sup> but that if there be also authorization to agree upon rates, then the later ordinance impairs the obligation of contract and is therefore invalid.<sup>3</sup> An ordinance of the latter kind was overthrown in the recent case of *City of Minneapolis v.*

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<sup>1</sup> *In re Pryor*, 55 Kan. 724; *Lewisville Natural Gas Co. v. State*, 135 Ind. 49.

<sup>2</sup> *Rogers Park Water Co. v. Fergus*, 180 U. S. 624; *Freeport Water Co. v. Freeport City*, 180 U. S. 587; *Omaha Water Co. v. City of Omaha*, 147 Fed. 1.

<sup>3</sup> *Los Angeles v. Los Angeles Water Co.*, 177 U. S. 558, 578; *City of Cleveland v. Cleveland City Railway Co.*, 194 U. S. 517, 535, 536. See 16 HARV. L. REV. 1-21.



*Minneapolis Street Railway Co.*, U. S. Sup. Ct., Jan. 3, 1910. And a like result has been reached where the agreement with the company merely fixed a maximum rate.<sup>4</sup>

Where there are two possible constructions of a franchise, the presumption should be in favor of the public;<sup>5</sup> hence it seems doubtful whether the fixing of a maximum rate ought to be regarded as an agreement not to regulate rates. The construction adopted by the Supreme Court is, however, supported by the weight of authority.<sup>6</sup> But even where there is a contract expressly waiving the right to reduce rates, the distinction taken by that court is open to the objection that it makes the validity of the contract, and so its impairment by a subsequent regulation, depend upon the express authorization of the municipal corporation, not only to regulate rates but also to make agreements concerning them. It is submitted that a municipality has the power to contract as an inherent attribute of its corporate character.<sup>7</sup> Whether or not it has the right as well as the power to contract in a given instance, should depend not upon express legislative authority, but upon those considerations which ordinarily determine the validity of a municipal contract. The agreement should be effectuated unless it furthers a purpose other than a public one;<sup>8</sup> or unless the power to enter into it is restricted by the legislature;<sup>9</sup> or unless it be against public policy.<sup>10</sup> In the absence of express legislative restrictions, such contracts as those under consideration are unobjectionable save, perhaps, on the last named ground.

Legislative regulation of rates charged by public service companies has been explained as an exercise of the police power.<sup>11</sup> That neither the State nor those to whom it has delegated its powers can by contract waive the right to enforce such well-defined police regulations as protect the health, safety, or morals of the community is well settled.<sup>12</sup> It seems, however, to be no longer open to doubt that a state may, by agreement in terms, waive its right to regulate rates.<sup>13</sup> It is submitted that the reason for this seeming inconsistency lies in the fact that the regulation of public service companies is not so much an exercise of the police power, as an exercise of the right to control employments affected with public interest.<sup>14</sup> The objections to con-

<sup>4</sup> *Detroit v. Detroit Citizens Street Railway Co.*, 184 U. S. 368, 389.

<sup>5</sup> *Knoxville Water Co. v. Knoxville*, 189 U. S. 434; *Omaha Water Co. v. City of Omaha*, *supra*.

<sup>6</sup> *Pingree v. Michigan Central Railroad Co.*, 118 Mich. 314. *In re Pryor*, *supra*. But see *Knoxville Water Co. v. Knoxville*, *supra*.

<sup>7</sup> *Cf. City of Noblesville v. Noblesville Gas Co.*, 157 Ind. 162; *Ketchum v. City of Buffalo*, 14 N. Y. 356; *Town of Gosport v. Pritchard*, 156 Ind. 400.

<sup>8</sup> *Akin v. Bartow County*, 54 Ga. 59.

<sup>9</sup> *Gillette-Herzog Manufacturing Co. v. Canyon County*, 85 Fed. 396; *Jackson v. Bowman*, 39 Miss. 671.

<sup>10</sup> *City of London Lighting Co. v. City of London*, 82 L. T. N. S. 530; 3 ABBOTT, MUNICIPAL CORPORATIONS, § 249; *State of Ohio v. Cincinnati Gas Co.*, 18 Oh. 263, 293.

<sup>11</sup> *Munn v. Illinois*, 94 U. S. 113.

<sup>12</sup> *Beet Co. v. Mass.*, 97 U. S. 25; *Mayor v. Second Ave. Railway Co.*, 32 N. Y. 261; *Texarkana Gas Co. v. City of Texarkana*, 123 S. W. 213 (Ark.).

<sup>13</sup> *Seone v. New Orleans & Northwestern Railroad Co.*, 116 U. S. 352; *Pingree v. Michigan Central Railroad Co.*, *supra*. See *Georgia Banking Co. v. Smith*, 128 U. S. 174. *Contra*, *Laurel Fork Railroad Co. v. West Va. Transportation Co.*, 25 W. Va. 324.

<sup>14</sup> *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, 696. See 21 HARV. L. REV. 609.

tracting away this less fundamental and more recently established governmental function are evidently less cogent than in case of the police power, the exercise of which is the primary duty of the state. Furthermore, where the waiver is by a municipal corporation, since the state is not a party to the contract, there seems to be no basis, in spite of intimations to the contrary in the principal case, for regarding the state's power to regulate as also waived.<sup>15</sup> The latter power remaining intact, any objections to such contracts on the ground of public policy, are without foundation.

THE EXTRA-TERRITORIAL FORCE OF A DECREE BY A COURT OF EQUITY. — A decree affecting a foreign *res*, either positively or negatively, is often asked against the defendant in a court of equity. Since the court has jurisdiction by personal service,<sup>1</sup> with the resulting power to enforce the decree by an imprisonment of the person of the defendant, it can refuse to grant the relief sought only on the ground that it is inexpedient, or in violation of the principles of the conflict of laws, to interfere with property within the territory of a foreign sovereign. Thus relief has been given against a threatened tort to foreign property,<sup>2</sup> or against acts in foreign territory constituting a breach of contract.<sup>3</sup> Even such relief, however, involving as it does no positive act within a foreign territory, has been refused,<sup>4</sup> though only on the ground of inexpediency; for clearly no sovereign would object to an exercise of such slight control over his property. It has been suggested that a decree compelling the defendant to perform within the jurisdiction of the court an act which will interfere affirmatively with foreign property, such as the conveyance of foreign lands by a defendant trustee, may be justified by the implied consent of the sovereign whose territory is thereby affected.<sup>5</sup> But the fact that such a decree is recognized as valid under the full faith and credit clause of the Constitution of the United States<sup>6</sup> demonstrates that the sovereign rights of a state are not impaired by such jurisdiction. It is possible that cases involving slight extra-territorial action under the direction of the court might be justified by an implied consent; but any decree

<sup>15</sup> *Contra*, 56 Fed. 339, 345. The state has been held bound by a franchise granted by a city. *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1. But the state is the real grantor of a franchise, so that there is no analogy to a contract. *State, Hutchinson, et al. v. Belmar*, 61 N. J. L. 443.

<sup>1</sup> Personal service is necessary when no *res* is within the jurisdiction. *Wallace Wilson v. American Palace Car Co. of New Jersey*, 65 N. J. Eq. 730.

<sup>2</sup> *Alexander v. Tolleston Club of Chicago*, 110 Ill. 65; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462; *Schmiltz v. York Mfg. Co.*, 204 Pa. St. 1; *Munson v. Tryon*, 6 Phila. 395; *Jennings Bros. & Co. v. Beale*, 158 Pa. 283; *French v. Maguire*, 55 How. Prac. (N. Y.) 471; *Frank v. Peyton*, 82 Ky. 150.

<sup>3</sup> *Schofield v. Railway Co.*, 43 Oh. St. 571, 621.

<sup>4</sup> *Foreign torts*: *Morris v. Remington*, 1 Pars. Eq. (Pa.) 387; *Atlantic Pacific Telegraph Co. v. Balt. & Ohio R. R. Co.*, 46 N. Y. Super. Ct. 377; *Lindsley v. Union Silver Star Mining Co.*, 26 Wash. 301; *Northern Indiana Ry. Co. v. Mich. Central R. R.*, 15 How. (U. S.) 233. As to trespass, see 15 HARV. L. REV. 579.

*Breach of contract in foreign territory*: *Delaware L. & W. Ry. Co. v. New York S. W. Ry. Co.*, 12 N. Y. Misc. 230; *W. U. Tel. Co. v. Western & Atlantic R. R.*, 8 Baxt. (Tenn.) 54; *W. U. Tel. Co. v. P. A. Tel. Co.*, 49 Ill. 90.

<sup>5</sup> See 21 HARV. L. REV. 354.

<sup>6</sup> *Massie v. Watts*, 6 Cranch (U. S.) 148. The cases in state courts are collected in AMES, CASES IN EQUITY, p. 10, note 10.



requiring decided affirmative relief, such as one of specific performance, would be open to attack for lack of jurisdiction.<sup>7</sup> Certainly no sovereign could order a partition<sup>8</sup> or sale<sup>9</sup> of foreign lands. The abatement of a foreign nuisance, also, would seem to be without the jurisdiction of a court of equity. Nevertheless a federal court sitting in Arizona recently granted an injunction against a tort of this character: the waste waters of the defendant's canal, the intake of which was in Mexico, were flooding the plaintiff's land in Arizona. *The Salton Sea Cases*, 172 Fed. 792 (C. C. App. Ninth Circ.). If property in Mexico had been damaged, so that the injury as well as the act causing it had taken place in the foreign territory, the weight of authority would be against such a decision.<sup>10</sup> Similarly specific reparation of a tort or breach of contract, necessitating the performance of acts on territory outside the jurisdiction of the court, should not be given.<sup>11</sup> The principal case, however, is fully supported by precedent.<sup>12</sup> And the distinction is clear; for, although it appeared that the defendant might act affirmatively in Mexico, the court did not actually decree any performance in Mexico; nor was an act in Mexican territory necessary to carry out the injunction, as stoppage of the waters could be made in Arizona. So the defendant in the suit could not successfully plead lack of jurisdiction; and the prevention of local injury fully justified a decree which the court knew would indirectly lead to affirmative action in Mexico. It is seen, therefore, that the limitation on the power of a court of equity arising from a foreign *situs* of the property in controversy is, in cases of affirmative relief, absolute, because of the resulting lack of jurisdiction in the sovereign state; while if negative relief is sought, the limitation becomes a mere question of expediency.<sup>13</sup>

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DEBTOR OF THE ESTATE AS PERSONAL REPRESENTATIVE OF THE DECEDENT. — A claim in which obligor and obligee are one was, to the mind of the mediæval lawyer, unthinkable; and the appointment of a debtor as executor or administrator rendered a debt unenforceable.<sup>1</sup> In the case of the administrator such a result was so obviously beyond the contemplation of the decedent that its consequences were avoided by allowing the claim to be revived after the unity of its parties ceased.<sup>2</sup> The executor's

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<sup>7</sup> *The Port Royal R. R. Co. v. Hammond*, 58 Ga. 523. (Specific performance refused.) It is to be noticed that the jurisdiction actually exercised by a sovereign must not be given undue weight when it affects foreign subjects or foreign territory, as then its validity must be tested by the law of all nations.

<sup>8</sup> *Johnson v. Kimbro*, 3 Head (Tenn.) 557. See cases collected in Binney's Case, 2 Bland 99, 145.

<sup>9</sup> *Fall v. Eastin*, 215 U. S. 1; *Poindexter v. Burwell*, 82 Va. 507. But a sale may be accomplished indirectly if the court has jurisdiction over a person who has power to make a conveyance. See note 6, *ante*.

<sup>10</sup> *Mississippi & Missouri Ry. Co. v. Ward*, 2 Black (U. S.) 485; *People of N. Y. v. Central R. R. Co. of N. J.*, 42 N. Y. 283.

<sup>11</sup> It would seem that no court has attempted to grant such affirmative relief.

<sup>12</sup> *Miller & Lux v. Rickey*, 127 Fed. 573; *J. P. Stillman & Co. v. White Rock Mfg. Co.*, 3 Wood. & M. 538; *Willey v. Decker*, 11 Wyo. 496. *Contra*, *Morris v. Remington*, *supra*.

<sup>13</sup> This distinction is not taken by text-writers. DICEY, *CONFLICT OF LAWS*, 2 ed., p. 204; POMEROY, *EQUITY JURISPRUDENCE*, 3 ed., ¶ 1318.

<sup>1</sup> *Nedham's Case*, 8 Co. 135 a.

<sup>2</sup> *Hudson v. Hudson*, 1 Atk. 460.



debt, however, was irrevocably gone, on the theory that the testator must have foreseen the legal consequence of his act.<sup>3</sup> But such a voluntary release by operation of law was not allowed to injure creditors;<sup>4</sup> from earliest times, where without it the assets were insufficient, the executor's obligation was kept alive for their benefit.<sup>5</sup> And in the case of a legacy directed by the will to be paid out of the claim against the executor, the law of a later period gave effect to the testator's wishes.<sup>6</sup>

That even where the will contains no such direction a testator who entrusts execution to his debtor may intend no extinguishment, seems too clear for argument; and it remained for equity to relieve against the law's inequitable fiction. Text authority of distinction<sup>7</sup> clung, indeed, to a general doctrine that the naming of the debtor had the effect of a legacy to the amount of his debt; but its chief proponent so emasculated the rule by exceptions as to leave it without meaning.<sup>8</sup> Nor did the cases afford more than a shred<sup>9</sup> of support for such a principle. And for centuries now, the chancery courts have raised, as against a debtor executor, a trust for a legatee of an amount certain.<sup>10</sup> Whether the rule was the same as to residuary bequests was once doubtful,<sup>11</sup> but it is now clear that no distinction is to be taken on the point.<sup>12</sup> And even where there is no disposition of the residue, an executor's claim against himself is deemed a trust for the next of kin.<sup>13</sup> But if the proper evidence shows an intent in fact to release, there is of course no equity to bind the executor.<sup>14</sup> By statute in England all these chancery principles are recognized at law.<sup>15</sup>

In this country the earlier English<sup>16</sup> refinements have had little following. The courts of many states, both at law and in equity, have held a claim against a debtor executor or administrator assets in his hands for legatees as well as creditors.<sup>17</sup> In other jurisdictions legislation has attained the same result;<sup>18</sup> in some it has even declared such an obligation to be money received.<sup>19</sup> Under statutes of the latter type it may be necessary to hold a personal representative and his sureties liable to the full value of the claim, even though he was insolvent at appointment.<sup>20</sup> But to go this length, as some authority has done, at common law<sup>21</sup> or

<sup>3</sup> Nedham's Case, *supra*.

<sup>4</sup> 2 BL. COMM. 512.

<sup>5</sup> Holliday v. Boas, 1 Roll. Abr. 920 [Executors, G., 13].

<sup>6</sup> Stapleton v. Truelock, 3 Leon. 2 pl. 6; Flud v. Rumney, Yelv. 160.

<sup>7</sup> BUTTER, CO. LITT., 264 b (n. 1); TOLLER, EXECUTORS, 6 ed., 349.

<sup>8</sup> TOLLER, EXECUTORS, 6 ed., 349.

<sup>9</sup> Powis, J., in Wankford v. Wankford, 1 Salk. 299, 303.

<sup>10</sup> Phillips v. Phillips, 2 Freem. Ch. 11.

<sup>11</sup> Brown v. Selwin, Cas. Temp. Talb. 240, 242.

<sup>12</sup> Errington v. Evans, 2 Dick. 456.

<sup>13</sup> Carey v. Goodings, 3 Bro. C. C. 110.

<sup>14</sup> Strong v. Bird, L. R. 18 Eq. 315.

<sup>15</sup> 36 & 37 Vict. ch. 66, § 24.

<sup>16</sup> Thomas v. Thompson, 2 Johns. 471; Robinson v. Hodgkin, 99 Wis. 327.

<sup>17</sup> Crow v. Conant, 90 Mich. 247.

<sup>18</sup> N. J., GEN. STAT. 1896, 1426, § 8.

<sup>19</sup> OHIO, BATES' ANN. STAT. 1897, § 6069.

<sup>20</sup> Treweek v. Howard, 105 Cal. 434. Cf. *contra*, McCarty v. Frazer, 62 Mo. 263, 265. In New York the executor is liable as for money received. Baucus v. Stover, 89 N. Y. 1. But his sureties are not, unless at some time during the administration the principal was solvent. *In re David's Estate*, 44 N. Y. Misc. 337.

<sup>21</sup> Wright v. Lang, 66 Ala. 389.

under statutes adopting the common-law rule<sup>22</sup> cannot be correct. To say that what should be discharged has been discharged, may be useful; but to assume that what cannot be paid has been paid, is absurd. And in a discussion as to what the law ought to be, it is reasoning in a circle to argue that sureties contract with knowledge of what the law is,<sup>23</sup> and should not, therefore, be surprised at being held accountable for personal obligations as well as for official acts. The correct, and happily the more general, view is forcibly put in a recent Illinois decision. *Wachsmuth v. Penn Mutual Life Ins. Co.*, 89 N. E. 787 (Ill.).

CHANGE OF BUSINESS AS AFFECTING LIABILITY TO BE MADE AN INVOLUNTARY BANKRUPT. — The Bankruptcy Act of 1898 provides that, "any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading," and certain other pursuits, owing debts to the amount of one thousand dollars or over, "may be adjudged an involuntary bankrupt."<sup>1</sup> Under this provision, the question has frequently arisen as to the effect of a change by the debtor, prior to the petition, from an occupation of the exempt class to one of the non-exempt class, or *vice versa*. The Supreme Court has not yet passed on the question; while the decisions in the lower federal courts are so far from harmonious that there are three distinct tests, by no means consistently applied, as to the time as of which the debtor's character is to be determined. (1) The date of the petition. This accords with the literal language of the Act,<sup>2</sup> with the general rule of law that jurisdiction is settled as of the date of the commencement of proceedings,<sup>3</sup> and with the analogous cases of change of domicile;<sup>4</sup> and it is usually applied where the debtor is in a non-exempt class at the date of the petition.<sup>5</sup> The courts generally refuse, however, to grant a debtor exemption merely because he is in the exempt class on the day of the petition, even though *animo manendi*, in order to prevent an embarrassed debtor from rendering his preferential transfer unimpeachable.<sup>6</sup> But this departure, although reaching a desirable result, is clearly a judicial amendment of the statute. (2) The date of the act of bankruptcy. Unless this test, which is applied to a change either to a non-exempt<sup>7</sup> or to an exempt occupation,<sup>8</sup> is qualified, as intimated in some of the cases,<sup>8</sup> by the proviso that the debtor must have been in the exempt class both at the date of the act of bankruptcy and for a reasonable time prior thereto, it

<sup>22</sup> *Judge of Probate v. Sulloway*, 68 N. H. 511.

<sup>23</sup> *Treweek v. Howard*, *supra*.

<sup>1</sup> § 4 b.

<sup>2</sup> See definition 10 in the Act, and § 4 b.

<sup>3</sup> *Cf. Mollan v. Torrance*, 9 Wheat. (U. S.) 537; *Re New England Breeders' Club*, 165 Fed. 517.

<sup>4</sup> *McConnel v. Kelley*, 138 Mass. 372. *Cf. Robinson v. Hughes*, 117 Ind. 293.

<sup>5</sup> *Re Matson*, 123 Fed. 743; *Re Interstate Paving Co.*, 171 Fed. 604. See *Hoffschlaeger Co. v. Young Nap*, 12 Am. B. R. 521. *Cf. Butcher v. Easto*, 1 Dougl. 295.

<sup>6</sup> *Re Luckhardt*, 101 Fed. 807, 809.

<sup>7</sup> *Flickinger v. First Nat'l Bank*, 145 Fed. 162; *Olive v. Armour & Co.*, 167 Fed. 517. See *Tiffany v. La Plume Condensed Milk Co.*, 141 Fed. 444, 448.

<sup>8</sup> *Re Luckhardt*, *supra*. See *Re Hoy*, 137 Fed. 175; *Re Pilger*, 118 Fed. 206.



is objectionable as inexpedient when applied to changes to an exempt class; and in any event it is quite a stretch of the language of the statute. (3) Under early bankruptcy statutes exempting non-traders, the courts held a debtor to be non-exempt if he was in a non-exempt class at any time, either when he incurred<sup>9</sup> or while he owed<sup>10</sup> the petitioning creditor's debt. Under our present statute, there are some *dicta* adopting this harsh<sup>11</sup> test;<sup>12</sup> but the decisions do not go beyond the holding in a recent case: that where the debtor incurs debts while non-exempt, and then changes to an exempt class before the act of bankruptcy, his character is to be determined as of the time of incurring the debts and acquiring the assets scheduled.<sup>13</sup> *Re Burgin*, 173 Fed. 726 (Dist. Ct., N. D. Ala.). On the other hand no decision has held a debtor exempt merely because his debts were largely incurred while he was in an exempt class.<sup>14</sup>

The composite result of the various tests seems to be, that where the debtor is in the non-exempt class at the date of the petition, he is amenable;<sup>15</sup> with a possible reservation where the change was subsequent to the act of bankruptcy<sup>16</sup> and, perhaps, to the incurring of the greater part of the debts.<sup>17</sup> But where the debtor is in the exempt class at the date of the petition, the courts have refused to allow the exemption, unless he was in that class at the date of the act of bankruptcy,<sup>18</sup> and probably also a reasonable time prior thereto.

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RELEASE OF SPECIAL POWERS IN GROSS. — A fine or recovery "ransacks the estates" of those joining in it and puts a tortious fee in the transferee.<sup>1</sup> The general doctrine that such a conveyance destroys a power in the grantor has been law for centuries.<sup>2</sup> But for almost as long a period it has been matter of controversy whether and how far a power in the holder of a particular estate to appoint a remainder to a class falls within this doctrine. An early leading case<sup>3</sup> laid down the sweeping proposition that a tortious conveyance extinguishes all powers appurtenant or in gross. From opposite sides two eminent text-writers struck at this result: Powel<sup>4</sup> denied

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<sup>9</sup> *England*: Heylor v. Hall, Palmer 325; Doe v. Lawrence, 2 Car. & P. 134; *Re Dagnall*, 1896, 2 Q. B. 407. *United States*: See under Act of 1841, Baldwin v. Rosseau, Fed. Cas. 803. *Cf.* under Act of 1867, Davis v. Armstrong, Fed. Cas. 3, 624.

<sup>10</sup> Butcher v. Easto, *supra*.

<sup>11</sup> The early bankruptcy acts were quasi-criminal. See 1 Peake 91, n.

<sup>12</sup> Tiffany v. La Plume Condensed Milk Co., *supra*.

<sup>13</sup> *Cf.* Baldwin v. Rosseau, *supra*. The cases holding amenable corporations which have ceased all active business may be explained on this ground. *Re C. Moench & Sons Co.*, 130 Fed. 685.

<sup>14</sup> Hoffschlaeger Co. v. Young Nap, 12 Am. B. R. 521, contains a *dictum* the other way. See also cases cited in notes 16 and 17, *ante*.

<sup>15</sup> *Re Matson*, 123 Fed. 743.

<sup>16</sup> Flickinger v. First Nat'l Bank, 145 Fed. 162. See Olive v. Armour & Co., 167 Fed. 517; Tiffany v. La Plume Condensed Milk Co., *supra*.

<sup>17</sup> See *Re Luckhardt*, 101 Fed. 807. But see Tiffany v. La Plume Condensed Milk Co., *supra*.

<sup>18</sup> See *Re Pilger*, 118 Fed. 206; *Re Luckhardt*, *supra*.

<sup>1</sup> 1 CRUISE, FINES, 3 ed., § 300; 2 *ibid.* § 234.

<sup>2</sup> Digges's Case, Moore Cas. 603.

<sup>3</sup> Edwards v. Sleater, Hard. 410, 416.

<sup>4</sup> POWEL, POWERS, 9, 32.

such interests to be in gross, and accordingly put them without the rule; Preston<sup>5</sup> accepted them as powers in gross, but insisted that they formed an exception to the rule. Powell's classification of powers was unsupported by authority then,<sup>6</sup> and has been neglected since; but the view of Preston, that one having no interest in a power beyond the function of exercising it may not release, seems to have been the view of at least one English judge.<sup>7</sup>

The case that almost a century ago founded the modern English law on the releasability of special powers in gross<sup>8</sup> did not squarely raise the point, as both conveyance and appointment were to the same person. And the court, while holding for an extinguishment on the ground that a grantor may not derogate from his grant, explicitly refrained from declaring as a positive rule of law that every power in gross may be released. This step was, however, taken in a direct decision<sup>9</sup> by the same court in the following year. And, thus established, the rule was shortly thereafter held to cover a case where the power was testamentary.<sup>10</sup>

The doctrine was so firmly supported by these cases that it managed to survive the passage of the act abolishing fines and recoveries,<sup>11</sup> which removed its technical foundation. And it was not long before a special power in gross over personalty was deemed releasable, and a contract against its exercise recognized as giving in common to the takers in default of appointment an equitable interest good against an appointee.<sup>12</sup> The principle found extreme expression in the holding<sup>13</sup> that a contract not so to exercise the power as to reduce the particular share of the covenantee below a certain amount, gives to the covenantee an equitable interest to that amount. Yet affirmative agreements to exercise a special testamentary power in a particular way are regarded as so far hampering the performance of a fiduciary function as to be for all purposes void.<sup>14</sup> That such of these inconsistent holdings as give effect to the negative agreements are anomalous, is the *dictum* of a leading case;<sup>15</sup> and that they are unfortunate is conceded by a recent decision which accepts them as binding. *In re Evered*, 54 Sol. J. 83 (Eng. Ch. D., Nov. 8, 1909).

Only a minority of the cases<sup>16</sup> in this country have gone the full length of the English authorities. One decision<sup>17</sup> accepts the rule that powers in gross are releasable while powers simply collateral are not, but argues that an authority in the holder of a particular estate to appoint a remainder to a class is simply collateral,<sup>18</sup> unless the relationship of children and parent

<sup>5</sup> 2 PRESTON, ABSTRACTS, 2 ed., 261.

<sup>6</sup> *Thomlinson v. Dighton*, 1 Salk. 239, relied on by the author, classifies such interests as "collateral" — a term frequently used as synonymous with "in gross" and differentiated from "simply collateral." See 22 HARV. L. REV. 444.

<sup>7</sup> *Jesson v. Wright*, 2 Bligh 1, 15.

<sup>8</sup> *West v. Berney*, 1 Russ. & M. 431.

<sup>9</sup> *Smith v. Death*, 5 Madd. 371.

<sup>10</sup> *Horner v. Swann*, 1 T. & R. 430.

<sup>11</sup> 3 & 4 WILL. IV. c. 74.

<sup>12</sup> *Walford v. Gray*, 11 Jur. N. S. 473.

<sup>13</sup> *Davies v. Huguenin*, 1 Hem. & M. 730.

<sup>14</sup> *In re Bradshaw*, [1902], 1 Ch. 436, discussed in 15 HARV. L. REV. 862.

<sup>15</sup> *Coffin v. Cooper*, 2 Dr. & Sm. 365.

<sup>16</sup> *Thorington v. Thorington*, 82 Ala. 489; *Grosvenor v. Bowen*, 15 R. I. 549.

<sup>17</sup> *Thomson's Executors v. Norris*, 20 N. J. Eq. 489, 524.

<sup>18</sup> This refinement upon Powell's view is as unsupported as that authority's broader expression. See note 6, *ante*.



subsists between the class of appointees and the donee. Another opinion,<sup>19</sup> carefully reasoned, follows the English classification of powers, but excepts from the rule powers in gross where there is no gift over in default of appointment. A third jurisdiction early held the doctrine with strictness to its technical foundation in the law of tortious conveyances;<sup>20</sup> a fourth, almost without argument, rejected it altogether.<sup>21</sup> And now that its result is disapproved at home, it is not to be supposed that a mediæval theory, resting upon the historical quality of methods of conveyancing abolished in the land where they originated, will maintain itself in jurisdictions<sup>22</sup> where those methods never were known or long ago became obsolete.

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LIABILITY OF AN ANOMALOUS INDORSER AT COMMON LAW AND UNDER THE NEGOTIABLE INSTRUMENTS LAW. — The precise nature of the obligation of one whose signature appears on the back of a bill or note before that of the payee has been always a subject of hopeless conflict at the common law. On the continent such an anomalous indorser is known as an *aval*, and is held liable to all subsequent parties as surety for that person to facilitate whose transfer the *aval* was given.<sup>1</sup> Most of the decisions under the common law agree that the extent of the liability depends wholly upon the intention of the parties; and various presumptions are resorted to for determining that intention. There are at least four distinct rules.

Such a signature is not an indorsement in appearance, since it precedes that of the payee, and therefore is not a link in the chain of title. Nor is it an acceptance, for only a drawee or one accepting for the honor of the maker can be an acceptor.<sup>2</sup> Hence many courts conclude that such an indorser should be presumed to have signed as co-maker.<sup>3</sup> It is so held in a recent case. *Barden v. Hornthal*, 65 S. E. 513 (N. C.). Other courts declare the anomalous indorser to be presumably a surety for the maker.<sup>4</sup> Both of these rules are objectionable, however, because, judged by ordinary mercantile custom, their presumptions are in the majority of cases contrary to fact. Still a third presumption is that the anomalous indorser is a second indorser,<sup>5</sup> the payee, by necessity being the first. And as this rule fails to protect the payee, the New York court, to effect that desirable result, ekes out the main presumption with a fiction, by which the payee is conclusively presumed to have indorsed without recourse to the anomalous indorser, and the latter to have indorsed back to the payee. In this way his liability is made that of a first indorser.<sup>6</sup> The sole merit of so violent a fiction is that it does afford a means of carrying out the probable intention

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<sup>19</sup> *Atkinson v. Dowling*, 33 S. C. 414.

<sup>20</sup> *Gaskins v. Finks*, 90 Va. 384.

<sup>21</sup> *Learned v. Tallmadge*, 26 Barb. (N. Y.) 443, 451.

<sup>22</sup> 4 KENT, COMMENTARIES, 12 ed., 497.

<sup>1</sup> *Steele v. McKinlay*, 5 App. Cas. 754. See 11 HARV. L. REV. 54.

<sup>2</sup> *Jackson v. Hudson*, 2 Camp. 447.

<sup>3</sup> *Draper v. Weld*, 13 Gray 580. See DANIEL, NEGOTIABLE INSTRUMENTS, § 713 a.

<sup>4</sup> *Ewan v. Brooks-Waterfield Co.*, 55 Oh. St. 596, 606. It would be as sensible to presume him a surety for the acceptor; but such a presumption seems not to have been indulged. See *Steele v. McKinlay*, *supra*, 764.

<sup>5</sup> *Eilbert v. Finkbeiner*, 68 Pa. St. 247.

<sup>6</sup> *Moore v. Cross*, 19 N. Y. 227.

of the parties. Finally, in New Jersey alone, the courts raise no presumption whatever, so that the allegation must be established by parol evidence.<sup>7</sup> An attempt has been made to treat the three positive rules of presumption as not mutually exclusive, by allowing the time when the anomalous indorsement was made to determine which rule should apply. Thus, if made before delivery to the payee, it will be presumptively the signature of a co-maker; if after delivery but before indorsement by the payee, presumptively that of a guarantor to the maker; if after indorsement by the payee, presumptively that of an indorser.<sup>8</sup> The same presumptions are usually applied also as between the original parties to the instrument.<sup>9</sup>

The general rule is that all these presumptions are rebuttable. Parol evidence has, however, been rejected on three grounds. (1) Such evidence would be varying a written instrument.<sup>10</sup> But as the very reason for admitting it is that the contract is ambiguous, this rule seems inapplicable. (2) Such evidence is admissible only as between the original parties and not as against a holder in due course.<sup>11</sup> (3) Such evidence, when offered to prove that the obligation assumed was a guaranty, is inadmissible as violating the Statute of Frauds.<sup>12</sup> These doctrines, however, are now obsolete, and parol evidence is almost universally admitted to show the actual intent of the parties.<sup>13</sup>

Where the Negotiable Instruments Law is in force the confusion arising from these various presumptions is done away with. The anomalous indorser is treated as a regular indorser,<sup>14</sup> except that his obligation is owed to the payee as well as to subsequent parties.<sup>15</sup> And parol evidence of a different intention is not admissible.<sup>16</sup> Only one case, apparently, is not provided for by the statute. Where a bill of exchange, payable to the maker, is indorsed by a third party as backer to the acceptor,<sup>17</sup> it would seem, although at least one case has held otherwise,<sup>18</sup> that the statute excludes the indorser from any liability to the maker.

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ADMISSIONS OF PARTY'S PREDECESSORS IN TITLE AS EVIDENCE AGAINST HIM. — The rule that a party's extra-judicial admissions are competent evidence against him rests upon the broad ground that any former statements contrary to his present claim tend to show his unreliability.<sup>1</sup> Unless pro-

<sup>7</sup> *Elliott v. Moreland*, 69 N. J. L. 216.

<sup>8</sup> *Good v. Martin*, 95 U. S. 90.

<sup>9</sup> *Co-maker*: *Ballard v. Burton*, 64 Vt. 387. *Guarantor*: *Milligan v. Holbrook*, 168 Ill. 343. *Indorser*: *Temple v. Baker*, 125 Pa. St. 634; *Phelps v. Vischer*, 50 N. Y. 69. *No presumption*: *Chaddock v. Vanness*, 35 N. J. L. 517.

<sup>10</sup> *Heath v. Van Cott*, 9 Wis. 516.

<sup>11</sup> *Schneider v. Schiffman*, 20 Mo. 571.

<sup>12</sup> *Temple v. Baker*, 125 Pa. St. 634. *Contra*, *Ford v. Hendricks*, 34 Cal. 673. See AMES, CASES ON SURETYSHIP, 107.

<sup>13</sup> *Good v. Martin*, 95 U. S. 90.

<sup>14</sup> NEGOTIABLE INSTRUMENTS LAW, § 64.

<sup>15</sup> *Ibid.*, § 64, 1.

<sup>16</sup> *Baumeister v. Kuntz*, 42 So. 886 (Fla.). But see *Kohn v. Consolidated Co.*, 63 N. Y. Supp. 265.

<sup>17</sup> See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 50, 77, 141-3, 221.

<sup>18</sup> *Haddock, Blanchard, & Co. v. Haddock*, 118 App. Div. 412; 103 N. Y. Supp. 584. See 22 HARV. L. REV. 300.

<sup>1</sup> 2 WIGMORE, EVIDENCE, § 1048.



bative force is added to the evidence by the further fact that the declaration was against interest when made, an admission is offered, not as affirmative proof of the matter contained therein, but merely to show the party's propensity to contradict himself. It is necessary, therefore, that the declaration be against interest only at the time of the trial.<sup>2</sup> When property rights are in issue, the rule is extended to include admissions made by a party's predecessor in title, provided that such statements were made while the declarant was still in possession;<sup>3</sup> for, since both the declarant and the party against whom the declaration is to be introduced have had identically the same interest in the subject matter, contradictory statements by them arouse suspicion. Hence the extension applies not only to realty,<sup>4</sup> but also to personalty,<sup>5</sup> including non-negotiable choses in action.<sup>6</sup> Thus the declarations of a former holder of a promissory note are admissible against an indorsee who took after maturity,<sup>7</sup> or with notice of defects.<sup>8</sup>

An imperfect understanding of the principle of admissions has led to some confusion in the decisions. It is often said that the reason for admitting such declarations is that the declarant would not have made an admission prejudicial to his own interest unless it had been true.<sup>9</sup> This erroneously makes the test the prejudicial character of the statement when made, instead of at the time of the trial. It frequently happens, where the statements were made by a predecessor in title, that they can be put in either as admissions or as declarations against interest by one now deceased; but this double possibility should not obscure the principle upon which the doctrine of admissions rests.

Another source of confusion, in actions concerning realty, is the statement sometimes seen in the cases,<sup>10</sup> and reflected in a recent decision, that the admissions of a party or of his predecessors in title are competent, not as evidence of title or lack of it, but only to show the nature and extent of possession. *Gilmartin v. Buchanan*, 119 N. Y. Supp. 489 (Sup. Ct. App. Div.). The argument is that a parol disclaimer of title is inoperative by reason of the statute of frauds.<sup>11</sup> But this assumes that a legal title has been shown to have vested in the declarant, which is sought to be divested by this parol evidence.<sup>12</sup> Such a situation, however, does not begin to cover the entire field of cases in which the issue may be one of title and not of possession only.<sup>13</sup> Where the construction of a deed is in doubt, as in a boundary dispute<sup>14</sup> like that of the principal case; or where the legal effect of the

<sup>2</sup> *State v. Anderson*, 10 Ore. 448, 454.

<sup>3</sup> *Lady Dartmouth v. Roberts*, 16 East 334; *Woolway v. Rowe*, 1 A. & E. 114; *Gibblehouse v. Stong*, 3 Rawle (Pa.) 437.

<sup>4</sup> *Jackson v. Bard*, 4 Johns. (N. Y.) 230; *Blake v. Everett*, 1 Allen (Mass.) 248. See *Smith v. Martin*, 17 Conn. 399, 401.

<sup>5</sup> *Holt v. Walker*, 26 Me. 107. *Contra*, *Coit v. Howd*, 1 Gray (Mass.) 547.

<sup>6</sup> *Abbott v. Muir*, 5 Ind. 444.

<sup>7</sup> *Robb v. Schmidt*, 35 Mo. 290. *Contra*, *Paige v. Cagwin*, 7 Hill (N. Y.) 361.

<sup>8</sup> *Glanton v. Griggs*, 5 Ga. 424.

<sup>9</sup> See *Chadwick v. Fonner*, 69 N. Y. 404, 407.

<sup>10</sup> See *Jackson v. Shearman*, 6 Johns. (N. Y.) 19, 21. See also *People v. Holmes*, 166 N. Y. 540, 546; *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.) 407, 410.

<sup>11</sup> See *Jackson v. Cary*, 16 Johns. (N. Y.) 302, 306.

<sup>12</sup> See *Jackson v. Cole*, 4 Cow. (N. Y.) 587, 593.

<sup>13</sup> *Jackson v. Myers*, 11 Wend. (N. Y.) 533, 536.

<sup>14</sup> *Jackson v. M'Call*, 10 Johns. (N. Y.) 377; *Smith v. Powers*, 15 N. H. 546; *Tomlin v. Cox*, 19 N. J. L. 76; *Deming v. Carrington*, 12 Conn. 1.

very deed relied upon in proof of title is called in question by the grantee's admission that he held merely as trustee for another, who had paid the purchase money,<sup>15</sup> or that the deed was a fraud upon creditors,<sup>16</sup> or had been antedated;<sup>17</sup> admissions, like any other parol evidence, are competent to prove the state of the title. The doctrine of admissions is to be kept distinct also from the rule that declarations, by one in possession, relating to the character or extent of his possession, are admissible as part of the *res gestæ*, giving color to the act of possession.

## RECENT CASES.

**BANKRUPTCY — INVOLUNTARY PROCEEDINGS — EFFECT OF CHANGE OF OCCUPATION.** — A was engaged in mercantile pursuits during the period when the debts scheduled in a petition in bankruptcy against him were contracted, and the assets acquired or owned. At the dates of the act of bankruptcy, and of the filing of the petition, he was engaged in farming. *Held*, that he is nevertheless amenable to bankruptcy proceedings. *Re Burgin*, 173 Fed. 726 (D. Ct., N. D., Ala.). See NOTES, p. 393.

**BANKRUPTCY — PREFERENCES — EXCHANGE OF PROPERTY.** — A buyer of cows advanced part of the purchase price. The bankrupt within the four months period delivered the cows giving credit for the advance. *Held*, that the delivery is not a preference. *Templeton v. Kehler*, 173 Fed. 575 (Dist. Ct., E. D. Pa.).

Upon the assumption that the buyer had reasonable cause to believe a preference was intended, the case seems wrong on principle. There is, however, sanction for it in the authorities. See *Mills v. Virginia-Carolina Lbr. Co.*, 164 Fed. 168. Obviously there can be no distinction between delivery of chattels and payment of money. In either case if the bankrupt at the time of delivery or payment owes this creditor an antecedent debt, such delivery is a preference. *In re Wolf*, 98 Fed. 84. Thus payment of the purchase price within ten days after delivery of the goods under a contract for a so-called "cash sale" is a preference. *In re Morrow & Co.*, 134 Fed. 686. But it is not necessary that the exchange of property and money be actually simultaneous to protect the creditor. *In re Davidson*, 109 Fed. 882. It is submitted that if, after the creditor has parted with title and all control over the property, the bankrupt delivers chattels or money in exchange within the four months' period, such delivery should be deemed a preference. Whether title has passed should be determined by the intent of the parties according to the usual rules in the law of sales. See *Bussey v. Barnett*, 9 M. & W. 312.

**BILLS AND NOTES — ANOMALOUS INDORSER — PRIMA FACIE LIABILITY.** — A made a note payable to B. Before delivery to B, X signed his name on the back. *Held*, that the *prima facie* liability of X is that of a co-maker. *Borden v. Hornthal*, 65 S. E. 513 (N. C.).

**BILLS AND NOTES — STATUTES — NEGOTIABLE INSTRUMENTS LAW: EFFECT ON STATUTE MAKING USURIOUS NOTES VOID.** — N. Y. Am'd L. 1879, c. 538, § 5, declared void all notes given for usurious consideration. The Negotiable Instruments Law provides that a holder in due course is free from defenses avail-

<sup>15</sup> *Gibblehouse v. Stong*, *supra*.

<sup>16</sup> *Norton v. Pettibone*, 7 Conn. 319.

<sup>17</sup> *Cook v. Knowles*, 38 Mich. 316.



able to prior parties among themselves. N. Y. LAWS OF 1898, c. 336, § 96. *Held*, that the maker of a usurious note is liable to a holder in due course. *Klar v. Kostiuk*, 119 N. Y. Supp. 683 (Sup. Ct. App. Div.).

By the law merchant, illegality of consideration was only an equitable defense. *Hopmeyer v. Frederick*, 74 Ill. App. 301. But statutes have frequently declared negotiable instruments given for usurious loans or gambling debts void, even in the hands of a holder in due course. *Clafin v. Boorum*, 122 N. Y. 385. Such statutes restrict negotiability, and are contrary to that spirit of the law merchant which aims to protect the *bonâ fide* purchaser. A fair construction of the Negotiable Instruments Law would seem to allow a holder in due course always to hold the maker, regardless of the nature of the consideration given by the payee. *Wood v. Babbitt*, 149 Fed. 818. It has sometimes been held, however, that the Negotiable Instruments Law does not affect usury and gambling statutes. *Alexander v. Hazelrigg*, 29 Ky. L. Rep. 1212. The purpose of these statutes was the prevention of such offenses, and where not expressly repealed, it has been argued that on grounds of public policy they should continue in force. But such a narrow construction unnecessarily hampers the circulation of notes. See 20 HARV. L. REV. 492.

CARRIERS — SLEEPING CARS — LIABILITY OF CARRIER FOR ACTS OF EMPLOYEE OF SLEEPING CAR COMPANY. — The porter of a sleeping car which was attached to the defendant's train, but which belonged to a separate company, wrongfully refused to make up the plaintiff's berth. *Held*, that the defendant is liable. *Taber v. Seaboard Air Line Ry.*, 66 S. E. 292 (S. C.).

By the weight of authority railroads are liable for the acts of the employees of a sleeping car company. The basis of liability is sometimes said to be the fact that both companies are operating the train jointly. *Airey v. Pullman Palace Car Co.*, 50 La. Ann. 648. But this explanation is erroneous, for a sleeping car company is not a carrier. *Duval v. Pullman Palace Car Co.*, 62 Fed. 265. Nor is such a company conversely liable for the acts of a railway servant. *Lawrence v. Pullman Palace Car Co.*, 144 Mass. 1. The carrier's liability is often put upon the ground that the porter is its agent. *Pennsylvania Co. v. Roy*, 102 U. S. 451. This, too, is an unsound explanation, for the carrier is liable even though by contract it has no right to control the porter. *Pullman Co. v. Norton*, 91 S. W. 841 (Tex.). The real basis of the liability is, as the present case states, that the carrier must make reasonable provision for the comfort and convenience, as well as for the safety of its passengers. See *Dwinelle v. N. Y. C. & H. R. R. R. Co.*, 120 N. Y. 107, p. 127. And the delegation of such a duty, whether as to equipment or as to roadway, will not free the carrier from liability for a breach. *Louisville, New Albany, & Chicago Ry. Co. v. Snyder*, 117 Ind. 435.

CONFLICT OF LAWS — EQUITY — ENJOINING AN ACT WITHOUT THE JURISDICTION CAUSING DAMAGE WITHIN. — The defendant constructed a canal conveying the waters of the Colorado River by means of an intake situated in Mexico. An accumulation of water resulted within the territory of Arizona which damaged the plaintiff's property situated therein. The plaintiff sought an injunction to prevent the injury. *Held*, that it was within the power of the court to grant the writ. *Salton Sea Cases*, 172 Fed. 792 (C. C. A., Ninth Circ.). See NOTES, p. 390.

CONFLICT OF LAWS — RIGHTS IN PROPERTY — PROPERTY ACQUIRED BY SPOUSES AFTER MARRIAGE. — A French citizen was married in France. As there was no antenuptial contract, the wife under the French law had a community of interest in his property. He subsequently became domiciled in New York where he acquired real and personal property and died intestate. *Held*, that the whole property is subject to the transfer tax. *In re Major's Estate*, 119 N. Y. Supp. 888 (Sup. Ct., App. Div.).

It is a general rule that rights in both realty and personalty are determined by the law of the *situs* at the time of the transaction. *Duncan v. Lawson*, 41 Ch. D. 394; *Cammell v. Sewell*, 5 H. & N. 728. In England this rule has been disregarded under facts similar to those in the principal case, and on the ground of an implied contract the law of the matrimonial domicile has been held to govern as to both personalty and realty. *De Nichols v. Curlier*, [1900] A. C. 21; *De Nichols v. Curlier*, [1900] 2 Ch. 410. But the American authorities support the principal case and repudiating the theory of an implied contract, properly determine by the law of the *situs* the passing of interests acquired after marriage. See *Saul v. His Creditors*, 5 Mart. N. S. (La.) 569. And even where the foreign law is adopted by an express antenuptial contract the courts hold it inapplicable to property subsequently acquired in another state. *Fuss v. Fuss*, 24 Wis. 256. But where the contract expressly states that the foreign law shall apply to property subsequently acquired elsewhere, it has been held to govern the distribution of personalty. *Decouche v. Savetier*, 3 Johns. Ch. 190. It is submitted that such a contract, although it creates an equitable right, should not affect the laws of another country regarding the title to or distribution of property subsequently acquired. See 13 HARV. L. REV. 601.

CONFLICT OF LAWS — SITUS OF CHOSSES IN ACTION — FOREIGN BONDS HELD BY FOREIGNER DOMICILED ABROAD. — The testator, a domiciled American citizen, died in England, having with him at the time foreign government and railway bonds. Held, that these bonds have their *situs* in England and are liable to the estate duty. *Winans v. Att'y-Gen.*, 26 T. L. R. 133 (Eng., H. L., Dec. 7, 1909).

The English estate duty applies to all property situated in the kingdom at the death of the owner. A debt as such can have no real *situs*. As early as the sixteenth century, however, it was laid down in England that the *situs* of a specialty debt was with the specialty. *Byron v. Byron*, 1 Cro. Eliz. 472. In furtherance of this view the English courts have been inclined to hold that where a debt is evidenced by a document the transfer of which makes a good title, the latter is a valuable chattel subject to taxation where found. So American railway shares have been held subject to probate duty in England. *Baroness Stern v. The Queen*, [1896] 1 Q. B. 211. The same has been held as to foreign bonds, being securities marketable within the kingdom. *Att'y-Gen. v. Bouwens*, 4 M. & W. 171. And a recent case says such bonds are taxable on the same theory as bank-notes. See *Att'y-Gen. v. Glendining*, 92 L. T. R. 87. The present decision settles the English law wisely and is in accordance with our own mercantile understanding. See *Blackstone v. Miller*, 188 U. S. 189; 21 HARV. L. REV. 50.

DECEIT — GENERAL REQUISITES AND DEFENSES — REFRAINING FROM EXERCISING LEGAL RIGHT. — The defendant, intending to induce the plaintiff to refrain from demanding payment from their mutual debtor, falsely represented that the debtor was solvent. The plaintiff relied upon this misrepresentation, and by the time he discovered the actual facts, the debtor had no assets. The plaintiff sued for deceit. Held, that the plaintiff cannot recover, because he had no interest in the debtor's property and because his damages are problematical. *Graham v. Peale, Peacock, & Kerr*, 173 Fed. 9 (C. C. A., First Circ.).

A requisite to the maintenance of an action for deceit is that the plaintiff act upon the defendant's misrepresentation. *Smith v. Chadwick*, 20 Ch. D. 27, 44. To refrain from acting or from enforcing a legal right is, however, a sufficient act. *Fotiller v. Moseley*, 179 Mass. 295; *Bowen v. Carter*, 124 Mass. 426. But in Massachusetts, where the present case arose, cases where a creditor, relying upon the defendant's misrepresentation, refrains from pressing his claim against his debtor have been confused with cases where the defendant has colluded with the debtor in conveying away his assets in fraud of creditors. See *Bradley v. Fuller*, 118 Mass. 239. In the latter, no recovery can be had unless the creditor



had a lien or other interest in the property. *Austin v. Barrows*, 41 Conn. 287; *Farmer v. Shannon*, 8 N. Y. St. Rep. 131; *Lamb v. Stone*, 11 Pick. (Mass.) 527. But in the former, it is enough that the creditor changed his position because of and relying on the misrepresentation. *Alexander v. Church*, 53 Conn. 561; *N. Y. Land Co. v. Chapman*, 118 N. Y. 288; *Fotler v. Moseley*, 185 Mass. 563. Failure to distinguish these two kinds of cases has led in the present case to the error which two neighboring states have avoided. See *Alexander v. Church*, *supra*; *N. Y. Land Co. v. Chapman*, *supra*. The difficulty of assessing damages is not a sufficient reason for refusing recovery in an otherwise good cause of action. It is for the jury to determine the damages, however difficult this may be. *Hunt Co. v. Boston Elevated Ry. Co.* 199 Mass. 220.

EQUITY — JURISDICTION — BILL BY ONE ON BEHALF OF MANY FOR DISTRIBUTION OF LIMITED FUND. — The plaintiff brought a bill on behalf of himself and all the other victims of embezzlement by X to recover against the surety on a bond given by X. The total amount alleged to be embezzled exceeded the penalty on the bond. *Held*, that the bill will lie. *Guffanti v. National Surety Co.*, 196 N. Y. 452.

The court rightly bases its decision on the jurisdiction of equity to administer a limited fund to which there are claims more than sufficient to exhaust the fund; or which will be dissipated if creditors having conflicting claims are restricted to their legal remedies. *Dimmick v. Register*, 92 Ala. 458; *National Park Bank v. Goddard*, 62 Hun (N. Y.) 31. It is upon this same principle that equity appoints receivers. KERR, RECEIVERS, Ch. I. The bill lies at the suit either of the claimants, or of the holder of the fund. *Dauler v. Hartley*, 178 Pa. St. 23; *American Surety Co. v. Lawrenceville Cement Co.*, 96 Fed. 25. It may also be brought, as in the principal case, by one claimant on behalf of himself and all others interested. *Crowell v. Cape Cod Ship Canal Co.*, 164 Mass. 235. In such a case, however, it must appear that the plaintiff is truly representative, and that the court can sufficiently protect those not made parties. *Smith v. Williams*, 116 Mass. 510. See 18 HARV. L. REV. 57. Where there are many non-resident claimants, courts sometimes refuse the bill. See *Smith v. Williams*, *supra*. The New York court, however, rightly decides that in the present case the existence of non-resident claimants, who may be excluded by an exhaustion of the fund through suits at law by those first learning of the embezzlement, is an argument for rather than against equitable interference.

EQUITY — JURISDICTION — UNFAIR COMPETITION. — A brought a bill in equity alleging that A, B, and C were competing expressmen; that D published a "Pathfinder" purporting to contain a full list of expressmen in that vicinity; that B and C by false statements and threats of injury to D's business induced him to omit any reference to A's business, thus damaging A. A therefore sought to have D enjoined from publishing the "Pathfinder" without A's name, and B and C from attempting to procure such publication. *Held*, that the bill is not demurrable. *Davis v. New England Railway Publishing Co.*, 89 N. E. 565 (Mass.).

The omission of the plaintiff's name from what purports to be a complete list of expressmen is equivalent to an assertion that he is not in the business. The Massachusetts court paid scant attention to the bearing on this case of the rule that equity will not enjoin a libel. The weight of American authority supports that rule, although it seems wrong on principle. See 16 HARV. L. REV. 67. But such a statement as this is not technically a libel, because it is not defamatory. Yet if consciously false, intended to damage and actually causing damage, it is actionable. *Ratcliffe v. Evans*, [1892] 2 Q. B. 524. Equity jurisdiction as to B and C may be based on the analogy of labor boycotts. The combination of B and C by threats to influence D's conduct, and through him the conduct of A's prospective customers toward A resembles a secondary rather than a primary boycott, and even without falsehood would probably be at least a *prima facie*

wrong. To what extent competition justifies, is a very debatable question of public policy. See 20 HARV. L. REV. 356 *et seq.* Clearly competition is no justification for falsehood.

EVIDENCE — ADMISSIONS — DECLARATIONS BY PREDECESSORS IN TITLE. — In an action of ejectment, involving a controversy over a boundary line not clearly described in the deeds, the defendant sought to introduce evidence of admissions made by the plaintiff's predecessors in title, to the effect that the boundary was as claimed by the defendant. *Held*, that parol admissions are competent only when possession, not ownership, is in issue. *Gilmartin v. Buchanan*, 119 N. Y. Supp. 489 (Sup. Ct., App. Div.). See NOTES, p. 397.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — DEBTOR AS PERSONAL REPRESENTATIVE OF DECEDENT. — The testator named as executors two debtors of his own. *Held*, that their obligations are to be deemed assets of the estate. *Wachsmuth v. Penn Mutual Life Ins. Co.*, 89 N. E. 787 (Ill.). See NOTES, p. 391.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — RIGHT TO RECOVER EXCESS PAYMENT FROM CREDITOR. — An administratrix, through negligence or mistake, paid the defendant a debt against the estate with estate funds. Later, the estate was declared insolvent and a *pro rata* payment of creditors was decreed. *Held*, that the administratrix can recover the payment in excess of the defendant's *pro rata* share. *Woodruff v. Claflin Co.*, 133 N. Y. App. Div. 874.

At common law the administrator's right of preference allowed him to pay one creditor in full, regardless of the others. *Lytleton v. Cross*, 3 B. & C. 317, 322. As such a payment was properly made it could not later be recovered. A legacy, however, when paid before the estate was known to be insolvent could be recovered. Under the modern rule that creditors should be paid *pro rata*, the excess paid to one creditor is more analogous to the payment of a legacy than to the old preferential payment. *Walker v. Hill*, 17 Mass. 380. Accordingly, the administrator has been allowed to recover on the ground of a contract to refund implied by law, or of a mistake of fact. *Wolf v. Beard*, 123 Ill. 585. A broader reason for recovery is that the preferred creditor has been unjustly enriched at the expense of other creditors. *Morris v. Porter*, 87 Me. 510. *Contra*, *Beardsley v. Marsteller*, 120 Ind. 319. Some courts deny recovery to a negligent administrator. *Lawson's Adm'rs v. Hansborough*, 10 B. Mon. (Ky.) 147. Others allow it even though the payment was tortious, reasoning that equity should encourage the administrator to right his wrong. *Clark v. Hougham*, 2 B. & C. 149. Such is the prevailing doctrine in the case of trustees. *Wetmore v. Porter*, 92 N. Y. 76. Were the defendant's real rights prejudiced, an exception might properly be made. *Brooking v. Farmers' Bank*, 83 Ky. 431. But where the defendant deserves only his proper *pro rata* share, the administrator should recover.

EXTRADITION — INTERSTATE EXTRADITION UNDER THE UNITED STATES CONSTITUTION — ABSOLUTENESS OF DUTY TO SURRENDER FUGITIVE FROM JUSTICE. — The Governor of Mississippi issued in due form to the Governor of Missouri a requisition for the arrest of the petitioner, a negro fugitive from justice. After being duly arrested, the petitioner sued out a writ of *habeas corpus*, on the ground that the race feeling in Mississippi would deprive him of a fair trial and of equal protection of the laws. *Held*, that he is not entitled to the writ, for the Governor of Missouri has a right to assume that the prisoner will be given a legal trial in Mississippi. *Marbles v. Creecy*, 30 Sup. Ct. 33.

The federal constitution provides for interstate extradition for all crimes. U. S. CONST. Art. 4, § 2, ¶ 2. And by statute it is made the duty of the executive



of the state to which the fugitive has fled to cause his arrest on demand. U. S. COMP. ST. (1901), § 5278. This duty is purely ministerial and permits of no discretion. *Ex parte Swearingen*, 13 S. C. 74. The governor has no authority to determine whether the charge is well founded. *People v. Byrnes*, 33 Hun (N. Y.) 98. And his duty to obey a requisition duly issued is absolute. *Johnston v. Riley*, 13 Ga. 97. But the surrender of a fugitive in actual custody on a criminal or civil charge may be postponed until the charge is satisfied. *Matter of Briscoe*, 51 How. Prac. (N. Y.) 422. That civil process has merely issued is not enough. *Ex parte Rosenblat*, 51 Cal. 285. And the governor has a right to surrender a fugitive, although already under arrest. *State v. Allen*, 21 Tenn. 258. But see *In re Opinion of the Justices*, 89 N. E. 174 (Mass.). This, however, is the extent of the governor's discretion. Yet it must be conceded that the general government cannot compel the performance of this duty of a state's officer. *Kentucky v. Dennison*, 24 How. (U. S.) 66. The right to require the surrender being clear, however, Congress undoubtedly has power to vest in any national officer the authority to arrest the fugitive. See *In the matter of Voorhees*, 32 N. J. L. 141, 146. The principal case rightly upholds the surrender; yet it might be criticized for failing to declare more unequivocally the absoluteness of the governor's duty.

FEDERAL COURTS — AUTHORITY OF STATE LAW — RULE OF PROPERTY. — The plaintiff sued in a federal circuit court to recover damages for a destruction of his surface land caused by the excavation of underlying coal previously deeded by the plaintiff to the defendants. After this suit was brought, the supreme court of the state wherein the land was situated and the cause of action arose, decided a similar case for the defendant. *Held*, that the Circuit Court of Appeals is not bound by the state decision. *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349.

The dissenting opinion of three judges seems to present the better view. For a discussion of the principles involved, see 23 HARV. L. REV. 139.

HIGHWAYS — RIGHTS AND REMEDIES OF ABUTTERS — EASEMENT OF LATERAL SUPPORT OF BUILDINGS. — A city built below a street a tunnel not for street purposes, thus causing the settling of the walls of the house of an abutter who did not own the fee of the street. For this damage an award was made under a statute authorizing the condemnation of all necessary real estate and rights, interests, and easements therein. *Held*, that the abutter is entitled to the award. *Matter of the Board of Rapid Transit Railroad Commissioners of the City of New York*, 42 N. Y. L. J. 1305 (N. Y., Ct. App., Dec. 17, 1909).

There is no natural right to lateral support for buildings whose weight increases the lateral pressure. *Thurston v. Hancock*, 12 Mass. 220. Nor can an easement for such support be acquired, in this country, by prescription. *Richart v. Scott*, 7 Watts (Pa.) 460. Since the beneficial use of land would otherwise be hampered a grant of an easement of lateral support should not be implied between private landowners. *Contra, Stevenson v. Wallace*, 27 Gratt. (Va.) 77. Such is the usual holding as to implied grants of the easements of light and air; and there is no valid ground for applying a different rule to cases of lateral support. *Keats v. Hugo*, 115 Mass. 204. *Contra, Janes v. Jenkins*, 34 Md. 1. The principal case extends to easements of the latter class the well established exception that easements of light and air, subject to interference for street purposes, are impliedly granted to an abutter whenever the title to the street is separated from that to the abutting land. *Adams v. Chicago, Burlington, & Northern Railroad Co.*, 39 Minn. 286; *Abendroth v. The Manhattan Railway Co.*, 122 N. Y. 1. It is submitted that this exception should not be extended to lateral support; for it cannot be said that furnishing lateral support to abutting buildings is, like supplying them with light, air, and access, the function of a highway. But cf. *Donahue v. Keystone Gas Co.*, 181 N. Y. 313.

**HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE — WIFE'S ACQUISITION OF HUSBAND'S INTEREST IN ESTATE BY ENTIRETY.** — At an execution sale, the plaintiff purchased her husband's interest as tenant by entirety with her. *Held*, that the entire estate is thereby vested in the plaintiff. *Mardi v. Scharmach*, 65 N. Y. Misc. 124 (Sup. Ct.).

Tenancy by entirety is founded on the legal fiction that husband and wife are one. *Stelz v. Shreck*, 128 N. Y. 263. These two natural persons hold the estate as one legal person, and on the death of either, the same estate continues in the survivor. *Stuckey v. Keefe's Executors*, 26 Pa. St. 397. That neither one can alienate the estate so as to bar the survivor is universally agreed; and some courts even hold that the husband cannot convey or encumber the estate for the period of his own life. *Chandler v. Cheney*, 37 Ind. 391, 408. *Contra*, *Barber v. Harris*, 15 Wend. (N. Y.) 616; *Torey v. Torey*, 14 N. Y. 430. But since at common law the husband during his life had absolute control over his wife's separate estate, it would seem to follow that the wife's interest in an estate by entirety would become vested in the husband for that period; so that having the entire interest in the estate, he could make a conveyance or mortgage, valid until his death. See *Ames v. Norman*, 4 Sneed (Tenn.) 683; *Meeker v. Wright*, 76 N. Y. 262, 267. Accordingly, this interest of the husband should be subject to execution. *Ames v. Norman*, 4 Sneed (Tenn.) 683. At the execution sale in the principal case, the wife acquired all her husband's interest. And since she already had a right of survivorship inalienable by him, she clearly became vested of the entire estate.

**INSURANCE — CONSTRUCTION OF PARTICULAR WORDS AND PHRASES IN STANDARD FORMS — "FIRE."** — The furnishings of a house were damaged, but not ignited, by the heat and smoke from an unusually hot furnace fire. The furnishings were insured against "all direct loss and damage by fire." *Held*, that the damage is covered by the policy. *O'Connor v. Queen Ins. Co.*, 122 N. W. 1038, 1121 (Wis.).

In determining what fires are covered by an insurance policy, the decisions have heretofore followed a single rule of construction: so long as a fire intentionally lighted is confined to its appropriate place, it is not a risk insured against. *Fitzgerald v. German-American Ins. Co.*, 30 N. Y. Misc. 72; *Cannon v. Phœnix Ins. Co.*, 110 Ga. 563. Under this test, the location of the fire is all important. Another rule suggested is that if goods purposely subjected to a fire are damaged, but not ignited, the insurance company is not liable. See *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 356, 360. This rule is unsatisfactory, since it considers not what fire did the damage but what goods were injured. The principal case presents yet another rule: that if an ordinary fire is intentionally lighted, damage without ignition caused by it is not covered; but if the fire becomes extraordinary and unsuitable for the use intended, resulting losses are recoverable. This rule emphasizes the kind of fire rather than its location. But the test is difficult to apply. See *The Amer. Towing Co. v. The German Fire Ins. Co.*, 74 Md. 25, 33. And the policy was scarcely meant to include a fire confined within its proper limits. So the wisdom of making this exception to the settled rule is doubtful. See *Samuels v. Continental Ins. Co.*, 2 Pa. Dist. 397.

**INTERPLEADER — BILL IN NATURE OF INTERPLEADER.** — A contracted with the C railroad to construct part of the latter's road. He made a subcontract with B for the construction, and B engaged various subcontractors. C owed A an undisputed amount which the subcontractors were attempting to attach, and which was wholly inadequate to satisfy all. Mechanics' liens asserted by the subcontractors were said by the court to be invalid. C joined A and the subcontractors as defendants in a bill in equity, and paid into court the sum due A. *Held*, that C is entitled to a bill in the nature of interpleader. *Chicago, Rock Island, & Pacific Ry. Co. v. Moore*, 123 S. W. 233 (Ark.).



To support a bill of strict interpleader there must be adverse claims mutually exclusive; if all the claims may be enforceable, obviously there is no occasion for interpleader. *Natl Life Ins. Co. v. Pingrey*, 141 Mass. 411; *Bassett v. Leslie*, 123 N. Y. 396. See 22 HARV. L. REV. 294. Where many claims are sought to be satisfied out of a fund inadequate to satisfy all, the requirement of mutual exclusiveness should not be applied so nicely as to defeat equitable relief. See *School Dist. v. Weston*, 31 Mich. 85. Where the plaintiff bases his right in equity on grounds other than those of strict interpleader, and where he is seeking further equitable relief than that of negative injunction, his bill is in the nature of interpleader. See *Illingworth v. Rowe*, 52 N. J. Eq. 360. Such a bill lies at the suit of a mortgagor seeking redemption of the mortgage against adverse claimants to the mortgage debt, or to remove the encumbrance of mechanics' liens. *Koppinger v. O'Donnell*, 16 R. I. 417; *Illingworth v. Rowe*, *supra*. Since the mechanics' liens in the principal case are invalid, there seems to be no ground for a bill in the nature of interpleader. But A claims the fund exclusively of all the subcontractors, for he denies any liability to B, and on the facts there is mutual exclusiveness, in the sense that each claim exhausts the stake. See *Aleck v. Jackson*, 49 N. J. Eq. 507.

JOINT WRONGDOERS — DISTINCTION\* BETWEEN JOINT TORTFEASORS AND CONTRIBUTORS TO INJURY. — The defendant was one of several independent upper riparian owners, refuse from whose mines destroyed the value of the plaintiff's sand-bar in such a manner that it was very difficult to prove how much of the damage was done by each. *Held*, that the plaintiff can recover only for the damage done by this defendant. *Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co.*, 66 S. E. 73 (Va.).

Tortfeasors are jointly and severally liable not only where they have acted in concert, or for a common purpose, but also where their originally independent acts have united to cause a single, inseparable injury. *Slater v. Mersereau*, 64 N. Y. 138; *Barnes v. Masterson*, 38 N. Y. App. Div. 612. It does not follow, however, that because it is very difficult to separate injuries into component parts, they form a single injury. *Little Schuylkill Navigation, etc. Co. v. Richards's Adm'r*, 57 Pa. St. 142. So even though an act, otherwise lawful, becomes a nuisance because other independent acts contribute, each tortfeasor is liable only for his share. *Harley v. Merrill Brick Co.*, 83 Ia. 73. It is true that equity will restrain all such independent tortfeasors by a single bill analogous to a bill of peace. *Lockwood Co. v. Lawrence*, 77 Me. 297. See POMEROY EQ. JURIS., 3 ed., § 269. But one injunction merely prevents each defendant from doing what he has no right to do, whereas one judgment would exact payment for a wrong done by another. *Blaisdell v. Stephens*, 14 Nev. 17. In the principal case, each bit of the defendant's refuse harms a distinct bit of the plaintiff's sand-bar, though it is practically difficult to measure their combined extent. *Swain v. Tennessee Copper Co.*, 111 Tenn. 430. But if his refuse united with that of the others to form a single injurious compound, a clear case of joint and several liability would be found.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — EFFECT OF COVENANT NOT TO ASSIGN UPON CONVEYANCE BETWEEN TENANTS IN COMMON. — A leased to B and C with a condition and covenant against assignment by the lessees. B assigned his interest to C. A with knowledge of the assignment accepted rent from C. *Held*, that C is entitled to exercise an option of renewal in the original lease. *Spangler v. Spangler*, 104 Pac. 995 (Cal., Ct. App.).

Inasmuch as the conveyance of his interest by one of two tenants in common to the other does not introduce a new tenant, it seems consistent with both the letter and the intent of the lease to hold that such a conveyance is not a breach of a condition or joint covenant not to assign. See *Roosevelt v. Hopkins*, 33

N. Y. 81; *Randol v. Scott*, 110 Cal. 590. The weight of authority, however, is opposed to this view. *Tober v. Collins*, 130 Ill. App. 333; *Varley v. Coppard*, L. R. 7 C. P. 505. The analogous conditions in insurance policies against "assignment or sale of the premises" have been held not to be broken by a conveyance of his interest by one joint owner to the other. *Hoffman v. Aetna, etc. Ins. Co.*, 32 N. Y. 405. See *Lockwood v. Middlesex, etc. Co.*, 47 Conn. 553. But even if the assignment in the principal case was a cause of forfeiture, it was waived by the acceptance of rent from the assignee with full knowledge of the facts. *Arnsby v. Woodward*, 6 B. & C. 519. The assignment was therefore unimpeachable, and the right to demand a renewal of the lease could be exercised by the assignee. *Barclay v. Steamship Co.*, 6 Phila. (Pa.) 558; *Piggot v. Mason*, 1 Paige (N. Y.) 412. This right is not altered by the fact that the original covenant to renew was made to several jointly, while its enforcement is sought by a single person. *Blount v. Connolly*, 110 Mo. App. 603. But see *Tober v. Collins*, *supra*; *Finch v. Underwood*, 2 Ch. D. 310, 316.

LEGACIES AND DEVISES — PARTICULAR INSTANCES OF CONSTRUCTION — DEVISE OF LAND TO UNPAID VENDOR. — A purchaser of real estate on which the full purchase price was unpaid devised the land to the vendor. After his death the vendor brought this action against the executor for the purchase price. *Held*, that he cannot recover. *Salvation Army v. Penfield*, 123 S. W. 539 (Mo., Kan. City Ct. App.).

As soon as a contract to purchase land is completed, equity treats the sale as completed and the purchaser becomes the equitable owner. *Seton v. Slade*, 7 Ves. 264, 274. Such an estate can be devised by the purchaser. *Alleyn v. Alleyn*, *Moseley* 262. That the purchase money is unpaid at the testator's death does not show that the intent of the testator was that the land should pass encumbered to the heir. *Hood v. Hood*, 3 Jur. N. S. 684. But such encumbrance, wherever possible, must be paid from the personal estate of the testator. *Langford v. Pitt*, 2 P. Wms. 628, 632. The principal case is, therefore, clearly erroneous, for the land descended to the devisee and the executor should have been ordered to pay the purchase price. The fact that the same person was both vendor and devisee is immaterial. It has even been held that where the same man is executor, devisee, and vendor, he can, as devisee, compel the purchase price to be paid to himself from the testator's personal estate. *Coppin v. Coppin*, 2 P. Wms. 290, 295.

MUNICIPAL CORPORATIONS — FRANCHISES AND LICENSES — CONTRACT NOT TO REGULATE RATES OF PUBLIC SERVICE COMPANIES. — A city granted a franchise to a street railway company, stipulating that the company should have a right to charge five cent fares, and that the city would not reduce such rates. The granting of the franchise was beyond the powers of the city, but the grant was subsequently ratified by the legislature. By ordinance, the city later reduced the fares. *Held*, that the ordinance is invalid. *City of Minneapolis v. Minneapolis Street Railway Co.*, U. S. Sup. Ct., Jan. 3, 1910. See NOTES, p. 388.

MUNICIPAL CORPORATIONS — OFFICERS AND AGENTS — DISQUALIFICATION BECAUSE OF INTEREST. — A city council passed an ordinance providing for improvements to a certain street upon which X, one of the councilmen voting for the ordinance, owned abutting property. Without his vote the ordinance could not have been passed. A bill was brought to have the ordinance decreed invalid on the ground that the vote of X was void. *Held*, that the vote of X is valid. *Gardner v. City of Bluffton*, 89 N. E. 853 (Ind. Sup. Ct.).

. It is a general principle of our law that a fiduciary cannot act in a transaction in which his personal interest conflicts with his duty as a fiduciary. Instances of this are found in the law of agency, private corporations, and trusts. *People v. Township Board*, 11 Mich. 222; *Aberdeen R. R. Co. v. Blaikie Bros.*, 1 Macq.



H. L. 461. Another example is the rule of parliamentary law that a direct pecuniary interest in a question disqualifies a member of the legislature from voting thereon. CUSHING, LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES, 9 ed., § 1844. Accordingly, it has been held that a vote cast by a member of a municipal deliberative body under such circumstances is void. *Oconto Co. v. Hall*, 47 Wis. 208. It is said in the principal case that the rule does not apply when the question before the body is legislative as distinguished from judicial. But there seems no reason why the general principle should be so limited, provided the interest of the member is in fact directly adverse to his duty as a representative. It may well be argued that such an adverse interest is not shown in the principal case, and on this ground the decision may be justified. *Steckert v. City of East Saginaw*, 22 Mich. 104; *City of Topeka v. Huntton*, 46 Kan. 634.

POWERS — RELEASE OF SPECIAL POWERS IN GROSS. — Under a marriage settlement a fund of £60,000 was given in trust to A for life, and after her decease to her issue then living as she might by will appoint, and in default of appointment to her children in equal shares. By deed A covenanted with one of her children not so to exercise her power of appointment as to reduce his share to less than £7,000, nor so as to postpone the vesting in possession of such share beyond the period of her death. The provisions of the will were inconsistent with this agreement. Held, that the covenantee is entitled to £7,000 in possession. *In re Evered*, 54 Sol. J. 84 (Eng., Ch. D., Nov. 8, 1909). See NOTES, p. 394.

RULE AGAINST PERPETUITIES — INTERESTS SUBJECT TO RULE — CONTRACT RAISING EQUITABLE RIGHT IN PROPERTY. — In a contract for the sale of land to the plaintiff, entered into in 1847, it was stipulated that the vendor, his heirs, appointees, and assigns, might at any time thereafter be at liberty to build a tunnel under the property sold. The plaintiff sought to restrain an assignee of the vendor from taking advantage of this stipulation. Held, that as the rule against perpetuities is not applicable, the contract is still valid and the injunction must be refused. *South Eastern Railway Co. v. Associated Portland Cement Manufacturers, Ltd.*, [1910] 1 Ch. 12.

It was formerly held that a contingent equitable right in land, arising by virtue of contract, was not subject to the rule against perpetuities, although it might not vest within the prescribed period. *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421. But a later English case, expressly overruling these earlier decisions, held that a covenant by the owner of land, giving an indefinite option to purchase, created an interest which was void by the rule and could not be enforced against a subsequent owner of the land with notice of the covenant. *London & South Western Railway Co. v. Gomm*, 20 Ch. D. 562. In the principal case, the result is reached on the theory that the doctrine of the case last quoted applies only to subsequent owners, and does not prevent the enforcement of the agreement against the original covenantor. This reasoning seems erroneous. The applicability of the rule against perpetuities is determined once for all at the time of the creation of the interest, and should not be affected by later events. See LEWIS, LAW OF PERPETUITIES, 171. Certainly the distinction suggested has not occurred to American courts in dealing with similar questions. *Winsor v. Mills*, 157 Mass. 362; *Starcher Brothers v. Duty*, 61 W. Va. 373.

TELEGRAPH AND TELEPHONE COMPANIES — DAMAGES FOR ERROR, DELAY, OR NON-DELIVERY — CIPHER MESSAGE. — Owing to a telegraph company's delay in delivering a cipher telegram, the plaintiff failed to consummate a sale. Held, that the plaintiff cannot recover damages for the loss of the sale, without showing that the company knew the meaning or importance of the message: *Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co.*, 122 S. W. 852 (Ky.).

Cases refusing recovery for improper transmission of a cipher message, of whose meaning the telegraph company has no outside information, are the result

of two lines of thought. The first considers damages like those sought in the principal case to be consequential; and so properly denies recovery unless the message itself discloses the details of the transaction sufficiently to put the consequences reasonably within the contemplation of the sending agent. *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1; *Sanders v. Stuart*, 1 C. P. D. 326. Cf. *Hadley v. Baxendale*, 9 Exch. 341. Cases of the second class more properly regard the loss of the value of the information that should have been delivered as direct damages, but require, with varying degrees of exactitude, that the transaction be so disclosed that the damages may be said to result naturally from the breach of that kind of a contract. *True v. International Telegraph Co.*, 60 Me. 9; *Fererro v. Western Union Telegraph Co.*, 9 App. D. C. 455. Cf. *Cutting v. Grand Trunk Railway Co.*, 13 Allen (Mass.) 381. It is submitted, that this requirement is satisfied if the message shows itself to be of business importance, and that the few cases opposed to the principal case are correct in holding that a cipher message reasonably conveys such information. *Western Union Telegraph Co. v. Way*, 83 Ala. 542. *Contra, Candee v. Western Union Telegraph Co.*, 34 Wis. 471.

**WILLS — TESTAMENTARY CAPACITY — DECLARATIONS OF ATTESTING WITNESS.** — The contestants of a will offered evidence of declarations by a deceased attesting witness that the testator was of unsound mind when the will was made. *Held*, that the evidence is inadmissible. *Speer v. Speer*, 123 N. W. 176 (Ia.).

When evidence of a declaration is admitted under some exception to the hearsay rule, it may be shown by way of impeachment that the declarant made contradictory statements. *Carver v. United States*, 164 U. S. 694. By the weight of authority, proof of a deceased subscribing witness's signature is proof of a declaration that the document was properly executed. *Neely v. Neely*, 17 Pa. St. 227; *Townsend v. Townsend*, 9 Gill (Md.) 506. But a very respectable minority, including Baron Parke, treat such evidence merely as direct proof that the witness put his name there in a particular manner. *Slobart v. Dryden*, 1 M. & W. 615. Where, as in the principal case, this latter view is adopted, there is no declaration to be impeached by contradictory statements. But even if the attestation is a declaration, it is submitted that it does not declare that the testator was sane. See *Baxter v. Abbott*, 7 Gray (Mass.) 71. *Contra, Stevens v. Leonard*, 154 Ind. 67. The average man would probably be willing to witness a friend's will, although he did not believe that the friend had testamentary capacity. If, therefore, there was no declaration that the testator was sane, the evidence offered could not go in as impeaching such a declaration.

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## BOOK REVIEWS.

**THE LEGISLATION OF THE EMPIRE.** A Survey of the Legislative Enactments of the British Dominions from 1808 to 1907. Edited by C. E. A. Bedwell. In four volumes. London: Butterworth and Company; Philadelphia: Cro-marty Law Book Company. 1909. pp. xxxv, 545; x, 482; x, 528; 231.

This valuable and interesting index to the legislation of Great Britain and of her colonies is the sort of book that is at once the despair and the envy of the American publicist. With all the extravagance at Washington, no money has ever been found to spend in compilations far more necessary of the statute law of the forty-six states, three territories, and the insular possessions of our Union. Such works can never have a popular sale large enough to justify the very great expense of publication. If the reviewer may be pardoned for alluding to his own digest, "American Statute Law," published in 1886, he would call attention to



the fact that so far as is known to its publisher, not only was there no help from the government, but not even one copy was purchased by the government for use of its ministers or consuls abroad, although several of them found the book so necessary in their work that they purchased and paid for it out of their own pockets. Germany, France, Great Britain, and, most notably of all, the little Kingdom of Belgium make annual official publications of the legislation both of those respective countries and even, in many respects, of the whole civilized world, as in the case of the monumental "Bureau of Labor" publication in Belgium. Under the auspices of the State Library of New York there has been a publication similar to this for nearly twenty years, most indispensable to all students of law and legislators, but the expense of this is borne by the State of New York.

The book we are reviewing is published under the auspices of the Society of Comparative Legislation of England, edited by C. E. A. Bedwell, with a preface by the Earl of Rosebery, and an introduction by Sir John Macdonell. It contains, in the first volume, the legislation of the British Isles, and the English possessions in North America, — that is to say, the Dominion of Canada, the eleven provinces thereof from Quebec to the Yukon Territory, Newfoundland, and Bermuda, with the Federal legislation of the Commonwealth of Australia, and the acts of New South Wales and Queensland. Volume II contains the rest of Australia, Papua, New Zealand, Fiji, and South Africa. Volume III, British India with its seven provinces, Ceylon, Hong Kong, Straits Settlements, Malay States, Mauritius, Seychelles, and Wei-Hai-Wei in China, Nyasaland, East Africa, Somaliland, and Uganda in East Africa, five provinces in West Africa, and the islands of the West Indies exclusive of Bermuda, British Guiana, British Honduras, Falkland Islands, St. Helena, and the Mediterranean colonies, so called, that is to say, Cyprus, Gibraltar, and Malta.

The work appears to be well done, although it might be wished that it were a little less of a summary index. The New York State Library Year Books seem to get a little more matter into a line than is the case with this English review. Also, an American student is puzzled by the different theories of indexing and the different names or catchwords. For example, one of the matters most likely to interest the American student is that of railway rate legislation, or laws fixing tolls in general, but neither one of these is to be found in the index, and even in the railway laws as digested that most important matter seems to be quite omitted. Inferentially it would appear that there is such legislation in Canada, while in Australia and New Zealand, the railways being under state ownership, such legislation is not necessary; but upon this most important matter the American reader gets no information. The same remark may be made on the subject of "Trusts," which word also does not appear in the index, nor do the words "combination or restraint of trade." On the other hand, another American subject — Constitutions — appears under that name in practically all of these colonies outside of the British Isles. Labor legislation, as is known, is very voluminous and radical in the Australasian colonies. As is pointed out by Lord Rosebery, there are many statutes curtailing personal liberty; more and more are licenses or diplomas required for exercising trades. "The age of contract seems to be ending; that of status returns" (Introduction, p. xxvi). On the other hand, there are very few acts affecting fundamental social institutions such as marriage, and scarcely any acts facilitating or extending the right to divorce, — in this respect notably different from the states of the American Union. New Zealand, however, as is apt to be the case in women's suffrage states, has much legislation making divorces easy and increasing the number of causes. Scarcely a colony has omitted to deal with some aspect of the sale of alcohol, usually by prohibitive legislation. Almost all the colonies have statutes excluding objectionable immigrants and shutting out the Chinese and Asiatics. Many of them limit or prohibit the sale of tobacco to minors, and the curfew act of British Columbia

makes it unlawful for a child under fourteen to be in the streets after nine p. m., and causes a curfew bell to be rung at that hour.

Sir John Macdonell tells us that there is a vast mass of labor legislation, except in South Africa, where there is none at all. These laws relate generally to factories, workshops, hours of labor, the prohibition of child labor, arbitration, and the fixing of wages as well as hours, in New Zealand at least; this being a novel economic experiment. In South Africa a factory is defined as any place where *one* person is employed, which makes possible the absolute regulation of employment except farm labor and domestic service. The compulsory arbitration laws, beginning in Victoria in 1890, have been copied throughout Australasia. They, with the minimum wage, are believed by most students to have arrested the industrial development of that country. The Canadian Act, more wisely drawn, contains no provision for compulsory arbitration. Many colonies, including Canada, have adopted statutes against "dumping." Tasmania, which we used to call Van Dieman's Land, is in the vanguard in matters æsthetic, for it prohibits the painting or advertising of any sign or name upon a rock or tree, or public place.

We may well conclude by quoting the general comment made in the Introduction: "They show a remarkable faith in the power of legislation to foresee what is best, to discipline men and to inculcate the practice of humane and moral principles. Perhaps, too, they show in the directness of their methods and disregard of tradition that worship of 'visible value' which Mr. Bagehot noted as a characteristic of colonial legislation."

F. J. S.

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THE LAW OF UNFAIR BUSINESS COMPETITION. By Harry D. Nims. New York: Baker, Voorhis, and Company. 1909. pp. xlvii, 581.

This is the most comprehensive treatise that has as yet been brought out under the title of "Unfair Competition." It includes chapters on unfair substitution, fraudulent names, trade secrets, good will, and trade libel. In other ways the author shows a proper conception of the real scope of his principal subject. He appreciates that this law against unfair competition which has grown up in recent years has at length practically disassociated itself from the subject of trademarks. To any observer of commercial conditions during the present generation, the extraordinary increase in unfair competition must have been noticeable. The advertised brand has acquired in modern times such an advantage in general merchandise that there have been far too many manufacturers and dealers ready to take the risk of virtual substitution or close imitation, trusting to their ability to escape the consequences by showing minor differences. But of late years the courts have shown such activity in meeting these new conditions by advancing the law to cover fraud in this new form that few offenders have escaped. And in no department of modern equity has the striking advantage of its peculiar processes been more clearly shown than in thus protecting legitimate business from unfair attacks. In this treatise the discussion of the fundamental principles is made more prominent than in the preceding books upon this subject; but, since it consequently discusses fewer cases upon the minor points, it might better be used by the practitioner along with the current books rather than in place of them.

B. W.

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A POCKET CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW. By John Henry Wigmore. Boston: Little, Brown, and Company. 1910. pp. liii, 566.

THE LAWS OF ENGLAND. By the Earl of Halsbury and other lawyers. Volume X. London: Butterworth and Company; Rochester: Lawyers' Co-operative



Publishing Company; Philadelphia: Cromarty Law Book Company. 1909.  
pp. clxix, 623, 39.

LAW OFFICE AND COURT PROCEDURE. By Gleason L. Archer. Boston: Little,  
Brown, and Company. 1910. pp. xxxv, 330.

HISTORY OF THE DEVELOPMENT OF LAW. By Martin F. Morris. Washington:  
John Byrne and Company. 1909. pp. 315.

THE LAW OF REAL PROPERTY. By Raleigh C. Minor and John Wurts. St. Paul:  
West Publishing Company. 1910. pp. lix, 959.

# HARVARD LAW REVIEW.

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VOL. XXIII.

APRIL, 1910.

NO. 6.

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## FREEDOM OF PUBLIC DISCUSSION.

THE process of continual readjustment between the needs of society and the protection of individual rights is nowhere more conspicuous than in the history of the law of defamation. If we look back to the time when the law defining that offense became substantially settled, we find prevailing a conception of such relative rights which is in many respects the antithesis of that which prevails to-day. Yet the law defining the affirmative offense, with its rigorous presumptions of falsity, malice, and damage, remains practically unchanged. It seems to have been thought that the vast increase in facility and area of communication, resulting from the use of the post, the telephone, the telegraph, and the modern printing press, justified the stringent principles of the law which had been formulated before such methods of communication were dreamed of. The development of the law, in accommodation to this vast change in the means of communication, has been in the direction of enlarging the scope of those principles of immunity, or privilege, some perception of which was coeval with the beginnings of the law upon the subject. Certain fundamental considerations have guided this growth. Immunity in defamation implies some freedom in the publication of matter which proves to be mistaken or false. It follows, necessarily, that persons defamed must suffer without remedy. The plainest principles of justice require, therefore, that immunity should be granted only within such limits as can be justified upon reasonable grounds. In some cases the possible public benefits of free communication may be equalled or counterbalanced by public evils. In such cases no immunity is granted, since the private injury would involve no compensating public benefits, save such as were offset by public



evils. On the other hand, there are cases in which the public benefits of free communication are so great that immunity must be granted however serious may be the individual injury, one overshadowing the other to such an extent that only the public interest can be regarded. In such cases the immunity is absolute. Within these two extremes come the various occasions on which there is a duty or interest which justifies some freedom of communication, but only so long as it is directed toward the accomplishment by the least harmful methods of the purpose for which the occasion exists. In such cases the immunity is qualified, or conditional, and is lost if the occasion be used for ulterior purposes. In all cases, in short, the existence and extent of the privilege is determined by balancing the needs of society with the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. Immunity should always be denied when the sacrifice of individual right outweighs the public good to be derived from it.<sup>1</sup>

In the light of such considerations, what is the nature and extent of the freedom which the law permits in the discussion of matters of public interest? That some distinction should be made between such matters and mere private gossip admits of no doubt; but there has been considerable difference of opinion — which, however, steadily lessens as we approach our own time — as to what matters properly come within this designation. In point of time, among the subjects which are now recognized as involving legitimate public interest, literary criticism first enjoyed complete liberty. Indeed, long after printing became common the view prevailed that an author who submitted his work to public judgment had, in this respect, no private rights at all. It was considered something outside the province of law, like an affair of honor, to attack an author's character as freely as his book; he enjoyed similar liberty in defending himself, and the feud was properly fought out in a literary rather than in a judicial arena. Meanwhile, with respect to political affairs, which are now regarded as matters of supreme public interest, the situation was otherwise. So long as the political pyramid rested upon its apex, instead of its base, all discussion of principles or persons was prohibited under the most severe penalties. In process of time, the dawning consciousness of the advantages of freedom of discussion in political

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<sup>1</sup> *Post Publishing Co. v. Hallam*, 16 U. S. App. 613; *Coleman v. MacLennan*, 78 Kan. 711; *Scripps v. Foster*, 41 Mich. 742.

affairs was accompanied by the realization of a conviction that the license of literary criticism should be restrained, and that the personal character of an author had claims to legal recognition as well as the public interests of the state. The significance of the gradual approximation of a uniform rule regulating the discussion of these two subjects is that freedom of literary criticism, being the first subject of public interest upon which the right to comment was formulated upon rational grounds, has exercised a marked influence on the gradual recognition of similar freedom of discussion in political affairs.<sup>1</sup>

The interest of private citizens in public affairs requires freedom of discussion rather than immunity in the statement of facts.<sup>2</sup> The truth is available at all times to every one. Protection in the communication of supposed facts, in all those cases where a duty or interest in disclosure exists, is otherwise provided by the general doctrine of conditional immunity or privilege. Discussion, as the term implies, is comment upon given facts; it is the expression of opinion by way of inference or conclusion from established facts. In its broadest aspect it is the judgment of acts and things from appearances. As such, its legal justification depends, not upon its truth in fact, but upon its "fairness" as a deduction from the premises of fact upon which it is based. Not only may that which is untrue in fact be fair as comment,<sup>3</sup> but the ultimate public service of discussion is that it affords a means of combating abuses, or offenses, or insidious corrupting

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<sup>1</sup> Bower, *Code of the Law of Actionable Defamation*, 379; Stephen, *Hist. Crim. Law of England*, ii, 376. The contrast between the points of view from which the subjects have been regarded may be indicated by the fact that Chief Justice Ellenborough, who, in 1808, in *Carr v. Hood*, 1 Camp. 355, formulated the principles of literary criticism in terms which are still cited, had, four years before, in *Rex v. Cobbett*, 29 How. St. Tr. 49, expressly followed the *dictum* of Lord Holt, then a century old, that "if persons should not be called to account for possessing the people with an ill opinion of the government, no government can subsist, for it is very necessary for all governments that the people should have a good opinion of it"; and he told the jury that "if a publication be calculated to alienate the affections of the people by bringing the government into disesteem . . . it is a crime."

<sup>2</sup> *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, *per* Holmes, C. J.

<sup>3</sup> *Speight v. Syme*, 21 Vict. L. R. 672. "Fair comment does not negative defamation, but establishes a defense to any right of action founded on defamation. To succeed upon the plea of justification the defendant must prove not only that the facts were truly stated, but also that the innuendo is true. He must justify every injurious imputation. Upon fair comment, however, if it be established that the facts stated are true, the defense of fair comment will succeed even if the imputation or innuendo be not justified as true, but be fair and *bonâ fide* comment upon a matter of public interest. *Walker v. Hodgson*, [1909] 1 K. B. 239, *per* Buckley, L. J.



influences, which lie hidden by concealment and perjury from judicial investigation. To prohibit criticism in matters of public interest unless the critic could vouch the truth in fact of his comment would be incompatible with the principles of popular government. Abuses might exist; there might be misconduct on the part of public men; there might be extravagance and corruption; yet no person would venture to speak. Hence the law protects and encourages the interchange of opinion so vital to the conduct of popular government, even though others may believe, and it may subsequently appear, that the imputation was in fact mistaken and unjust.

The overwhelming weight of authority holds that protection extends to comment alone. There is some authority, however, for the extension of immunity to statements of fact.<sup>1</sup> This view, which,

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<sup>1</sup> This view has been consistently maintained in Kansas and South Dakota. *Coleman v. MacLennan*, 78 Kan. 711; *State v. Balch*, 31 Kan. 465; *Myers v. Longstaff*, 14 S. D. 98; *Ross v. Ward*, 14 S. D. 240; *Boucher v. Clark Publishing Co.*, 14 S. D. 72. It appears to be the prevailing rule in Iowa and Maine. *Mott v. Dawson*, 46 Ia. 533; *Bays v. Hunt*, 60 Ia. 251; *State v. Haskins*, 109 Ia. 656; *State v. Keenan*, 111 Ia. 286; *Klos v. Zahorik*, 113 Ia. 161; *Cherry v. Des Moines Leader*, 114 Ia. 298 (but see *Clifton v. Lange*, 108 Ia. 472, and the incidental reference to the doctrine in *Morse v. Times-Republican Printing Co.*, 124 Ia. 707); *Beare v. Bass*, 88 Me. 521; *O'Rourke v. Lewiston Daily Sun Publishing Co.*, 89 Me. 310. See also *Marks v. Baker*, 28 Minn. 162. Other isolated cases give a measure of support to this view. *Evening Post Co. v. Richardson*, 113 Ky. 641; *Burke v. Mascarich*, 81 Cal. 302; *Crane v. Walters*, 10 Fed. 619; *Palmer v. Concord*, 48 N. H. 211; *Briggs v. Garrett*, 111 Pa. St. 404; *Jackson v. Pittsburgh Times*, 152 Pa. St. 406; *Ferber v. Gazette, etc. Assn.*, 212 Pa. St. 367; *Express Co. v. Copeland*, 64 Tex. 354; *Knapp v. Campbell*, 14 Tex. Civ. App. 199. See also *Tawney v. Simonson*, 124 N. W. 229 (Minn.). In England, in an early case involving a violent denunciation of a Parliamentary candidate, Sir James Mansfield, C. J., said: "If the words be actionable in themselves, it is quite immaterial whether they were spoken of him as a candidate or not. It seems to be supposed that the situation of a candidate for Parliament is such as to make it lawful for any man to say anything of him. To that proposition I cannot assent; nor is it to be collected from any of the cases which have been cited. It would be a strange doctrine indeed that, when a man stands for the most honorable situation in the country, any person may accuse him of any imaginable crime with impunity." *Howard v. Astley*, 1 B. & P. N. R. 47. In the subsequent cases of *Dunscombe v. Daniel*, 1 W. W. & H. 101, and *Pankhurst v. Hamilton*, 3 T. L. R. 500, the privileged occasion in such a case was more explicitly conceded, but in both cases there was actual malice. But in *George v. Goddard*, 2 F. & F. 689, and *Wisdom v. Brown*, 1 T. L. R. 412, involving defamatory charges made against a candidate in a meeting of rate-payers for the election of parish officers, two successive Chief Justices of England held the occasion to be privileged. There is high authority in Scotland to the same effect. In *Bruce v. Leisk*, 19 R. 482, in granting immunity to an elector who had falsely charged a candidate in a municipal election with having been bankrupt, and having made a disreputable failure, Lord President Robertson said: "I think that when electors are considering, with laudable

of course, renders superfluous any distinction between comment and statement, has been for the first time thoroughly developed by the Supreme Court of Kansas in a recent case involving the defamation of a candidate for public office.<sup>1</sup> The argument is this: The established doctrine of privilege protects statements made in the performance of a duty or the protection of an interest. It is of the deepest interest to the public that they should know facts which go to show that a candidate for office is unfit to be chosen. Therefore, every one should have the right to give the public the benefit of any information he may have affecting the fitness of a candidate. Can it be possible, it is asked, that public policy will make privileged an unfounded charge of dishonesty or criminality against one seeking private service, when made to the private individual with whom service is sought, and yet will not extend the same protection to him who in good faith informs the public of charges against applicants for public service? Is it not at least as important that the high functions of public office should be well discharged as that those in private service should be faithful and honest? Or, again, are the moral and social duties of great religious, fraternal, or charitable organizations to inform their members of the misconduct of a fellow member or officer any higher or stronger than that of electors to keep the public administration pure by disclosures respecting the character and conduct of candidates for public office?

The argument for immunity in the statement of facts concerning a candidate for an elective office — the only occasion on which the claim seems to have any weight — may be put more forcibly without going so far afield. In the case of a candidate for an appointive office it may well be urged that there is no necessity for a general publication, inasmuch as the selection rests with a particular official or authority, to whom alone publication should be made; and of course

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interest, who shall be elected, they are quite entitled to state to other people, similarly concerned, what they know, or believe they know, upon the delicate subjects which are then mentioned. That the statements are injurious and invidious is quite true; but then, unfortunately, that brings us into the region also of the duty of an elector to give due weight to them, and to communicate them to others whom he is legitimately seeking to influence. I do not think that we should thereby be giving any unlimited license to slander during an election. We do not lay it down that anybody is entitled to say anything against a candidate. Our decision is merely that the occasion of the speaking being what it was, and the thing said what it was, there is no presumption in law that there was malice."

<sup>1</sup> *Coleman v. MacLennan*, *supra*.



the same reasoning applies with particular force to statements affecting one who holds an office, in which case charges affecting his fitness should be made directly to the official or authority having the power of removal. Communications so made to the appointing or removing authority are unquestionably privileged. In the case of a candidate for an elective office every voter certainly has an interest, if not, indeed, a duty, in common with every other voter. But in this case it is an interest or duty which the voters themselves can alone protect or discharge. The choice rests directly and exclusively with them, and there would seem to be no logical objection to the conclusion that, in accordance with established principles, a voter should be protected in making a communication to his fellow voters of facts relating to a candidate for their suffrage.

The answer to this argument has reference to the difference in the area of defamation. The conditional immunity extended to a statement of fact to a master concerning a servant, or one applying for service, covers a statement to the master only, and the injury, if any, done to the servant's reputation is with the master alone. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, an important interest of society. But if the immunity were to apply generally, then a person who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person, or with a particular class of persons, but with the public at large, whenever an untrue charge is made.<sup>1</sup> It is, however, an established principle of the law of defamation that, given the common interest or duty which creates the privileged occasion, any publication reasonably necessary to protect that interest or to discharge that duty, is privileged; and this is the case even though it results in the incidental publication to persons having no duty or interest.<sup>2</sup> It would be a radical departure from fundamental principles to deny or limit the privilege because of the wide area of the interest or duty. Moreover, the cases disclose an area of publication in cases of unquestioned privilege coextensive with that under discussion. Charges made against an officer by a voter to his fellow voters assembled in a town or parish meeting have been held to be privileged.<sup>3</sup> Why, then, should not a statement made

<sup>1</sup> *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238; *Post Publishing Co. v. Hallam*, 16 U. S. App. 613.

<sup>2</sup> *Boxsius v. Goblet Frères*, [1894] 1 Q. B. 842.

<sup>3</sup> *Bradley v. Heath*, 12 Pick. (Mass.) 163; *Smith v. Higgins*, 16 Gray (Mass.) 251; *Bradford v. Clark*, 90 Me. 298.

by a voter in the same meeting convened to elect an officer be governed by the same rule? <sup>1</sup>

However, logic is not necessarily law. The whole doctrine of immunity in defamation is based upon public policy, and the only valid objection to protecting statements of fact in relation to candidates for elective office rests upon such considerations. It is the conviction that such a doctrine would do the public service more harm than good. The danger that honorable and worthy men may be driven from politics and public service by allowing such latitude in attacks upon personal character outweighs any benefits that might accrue to the public.<sup>2</sup> Such license would create a disinclination for public life on the part of honorable men by making them feel that it was incompatible with wholesome self-respect and decent reputation; it would drive men of sensibility away from its opportunities in sheer disgust, and leave public employment to callous and self-seeking adventurers. It seems plain that immunity in fair comment extends the utmost protection to free communication in matters of public interest that is compatible with a proper regard for personal rights. This at all events is the consensus of opinion among English-speaking people.<sup>3</sup>

The distinction is fundamental, then, between comment upon given facts and the direct assertion of facts. And the significance of the distinction is plain. If the facts are stated separately, and the comment appears as an inference drawn from those facts, any injustice that the imputation might occasion is practically negated by

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<sup>1</sup> See *George v. Goddard* and *Wisdom v. Brown*, *supra*.

<sup>2</sup> *Post Publishing Co. v. Hallam*, 16 U. S. App. 613; *Post Publishing Co. v. Maloney*, 50 Oh. St. 71; *Seely v. Blair*, *Wright* (Oh.) 358, 683; *Bronson v. Bruce*, 59 Mich. 467; *Dodds v. Henry*, 9 Mass. 262; *Sweeney v. Baker*, 13 W. Va. 158; *Campbell v. Spottiswoode*, 3 B. & S. 769; *Massie v. Toronto Printing Co.*, 11 Ont. R. 362; *Brown v. Elder*, 27 New Bruns. R. 465.

<sup>3</sup> In a general way, the majority of the American cases professing to discuss the subject of comment or criticism do not, as we shall see, involve any issue of that kind. The actual determination was simply that a defamatory statement of fact is not privileged merely by reason of the public interest of the subject matter. See cases cited in note 2 on page 432. In a few cases the decision is confined to this issue. *Post Publishing Co. v. Hallam*, 16 U. S. App. 613; *Seely v. Blair*, *Wright* (Oh.) 358, 683; *Eviston v. Cramer*, 57 Wis. 570; *Spiering v. Andrae*, 45 Wis. 330; *Ullrich v. N. Y. Press Co.*, 23 N. Y. Misc. 168. But all these cases, as well as those hereafter cited, which turn upon the distinction between comment and statement of fact, including almost the whole course of English authority, reject the doctrine that there is any immunity in the publication of false statements of fact merely because the subject matter is of public interest.



reason of the fact that the reader has before him the grounds upon which the unfavorable inference is based. When the facts are truthfully stated, comment thereon, if unjust, will fall harmless, for the former furnish a ready antidote for the latter. The reader is then in a position to judge whether the critic has not by his unfairness or prejudice libelled himself<sup>1</sup> rather than the object of his animadversion. But if a bare statement is made in terms of a fact, or if facts and comment are so intermingled that it is not clear what purports to be inference and what is claimed to be fact, the reader will naturally assume that the injurious statements are based upon adequate grounds known to the writer. In one case, the insufficiency of the facts to support the inference will lead fair-minded men to reject it; in the other, there is little, if any, room for the supposition that the injurious statement is other than a direct charge of the fact, based upon grounds known to the writer, although not disclosed by him.<sup>2</sup> The distinction

<sup>1</sup> This happy expression is used in *Popham v. Gilbert*, 7 H. & N. 891, and *Belknap v. Ball*, 83 Mich. 583.

<sup>2</sup> See particularly, *Davis v. Shepstone*, 11 A. C. 187; *Hunt v. Star Newspaper Co.*, [1908] 2 K. B. 309, per Fletcher-Moulton, L. J.; *O'Brien v. Salisbury*, 54 J. P. 215; *Jenner v. A'Beckett*, L. R. 7 Q. B. 11, per Lush, J.; *R. v. Flowers*, 44 J. P. 377; *R. v. Carden*, 5 Q. B. D. 1; *South Hetton Coal Co. v. News Assn.*, [1894] 1 Q. B. 133; *Christie v. Robertson*, 10 New South Wales L. R. 161; *Douglas v. Stephenson*, 29 Ontario, 616.

"The distinction has been brought out more clearly in England than it has been in our own decisions." *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, per Holmes, C. J. See, however, *Hubbard v. Allyn*, 200 Mass. 166; *Haynes v. Clinton Printing Co.*, 169 Mass. 512; *Dow v. Long*, 190 Mass. 138; *Gatt v. Pulsifer*, 122 Mass. 235; *Triggs v. Sun Printing & Pub. Assn.*, 179 N. Y. 144; *Howarth v. Barlow*, 113 N. Y. App. Div. 510; *McDonald v. Sun Printing & Pub. Assn.*, 45 N. Y. Misc. 441; *Fry v. Bennett*, 3 Bosw. (N. Y.) 200; *Hallam v. Post Publishing Co.*, 55 Fed. 456; *Vance v. Louisville Courier Journal*, 95 Ky. 41; *Belknap v. Ball*, 83 Mich. 583; *Peoples v. Detroit Post Co.*, 54 Mich. 457; *Pfister v. Milwaukee Free Press Co.*, 121 N. W. 938 (Wis.); *Sweeney v. Baker*, 13 W. Va. 158; *Mertens v. Bee Publishing Co.*, 5 Neb. (Unofficial) 592; *La Compagnie de Publication du Canada Revue v. Mgr. Fabre*, Que. O. R. 6 S. C. 436.

It may be admitted, as asserted in *Coleman v. MacLennan*, 78 Kan. 711, that "expressions of opinion and judgment frequently have all the force of statements of fact, and pass by insensible gradations into declarations of fact." But, keeping in mind the fundamental principle referred to above, it does not follow that "the distinction between comment and statements of fact cannot always be clear to the mind."

There has been very little legislation on the subject. In Georgia, "comments upon the acts of public men, in their public capacity, and with reference thereto," and in Texas, "a reasonable and fair comment or criticism of the official acts of public officials, and of other matters of public concern published for general information,"<sup>3</sup>

and its significance may be illustrated by an actual decision.<sup>1</sup> A publication advised voters to oppose a representative who was standing for reelection, "because in the last legislature he championed measures opposed to the moral interests of the community." It appeared from the answer that what the writer had in mind when he wrote the article was the plaintiff's support of two legislative measures permitting sales of liquor on legal holidays and authorizing the removal of screens from saloons.

"The defense was made, first, that the statement was true; and, second, that if it cannot be said to be true, the proven acts were subject to criticism, and the defendants had the right to express their opinion as to their effect; in other words, that the language was privileged. The defendants had a right to discuss the fitness of the plaintiff for the office to which he aspired, and might lawfully communicate to the electors any facts within their knowledge concerning his character or conduct, and express their opinion upon them, and their inferences deduced from them, so long as they stated as facts only the truth, and as opinions and inferences therefrom only honest belief. The fault here, if there be one, is that opinions and inferences are not stated as such, but as facts. The defendants sought to justify the statement made . . . by proving that he supported the two measures. . . . It is evident that the acts proved were sufficient to induce in the minds of some the opinion [that the charge was true, and such persons were privileged to say so]. But admitting that they were privileged to express their

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are declared to be privileged. Georgia Civil Code, sec. 2980, par. 6; Texas Laws of 1901, ch. 26, sec. 4. In the penal codes of New York and Minnesota it is provided that "the publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of mere comments upon the conduct of a person in respect to public affairs or upon a thing which the proprietor thereof offers or explains to the public." New York Penal Code, sec. 244, par. 5; Minnesota Penal Code, sec. 6177. The provision of the Pennsylvania Constitution of 1874, art. 1, sec. 7, declaring that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of persons or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury," relates to criminal proceedings alone. *Barr v. Moore*, 87 Pa. St. 387; *Briggs v. Garrett*, 111 Pa. St. 404. The Texas Penal Code, Art. 630, provides that "it is no offense to make true statements of fact, or express opinions as to the integrity or other qualifications of a candidate for any office or public place or appointment.

In view of the fact that many of the state constitutional provisions concerning the freedom of the press refer only to the expression of "sentiments" or "opinions," the distinction between comment and statements of fact may one day involve constitutional questions of vital importance.

<sup>1</sup> *Eickhoff v. Gilbert*, 124 Mich. 353.



opinions concerning certain acts, was this what was done? Did they not go further and do more? They did not state what measures were supported, and their opinions of that particular conduct, but said generally and unqualifiedly, as a fact, that the plaintiff had arrayed himself against the moral interests of the community, which, if true, should discredit him with any voter who should believe the statement. It appealed alike to all classes, . . . [those who took that view, and those who thought otherwise], and it afforded no one an opportunity to judge whether the statement was a proper deduction from the facts upon which it was based or not. If one states that a candidate is a thief, without qualification, he communicates a fact pertaining to his fitness; but it is a slander, if untrue, whether made in good faith or not, although, had he stated the exact facts, and expressed the opinion that they amounted to stealing, though they did not technically constitute the offense of larceny, the comment might be privileged. The difficulty in this case is that the defendants have been permitted to limit their statement by proof of their intended meaning, while the writing itself contained no hint of limitation."<sup>1</sup>

It is to be observed, moreover, that although comment, however expressed, is opinion or inference, it may be stated in terms of a fact; and as such it is within the immunity of fair comment so long as it appears to be a permissible deduction or conclusion from other facts truly stated.<sup>2</sup>

Comment, criticism, or discussion<sup>3</sup> upon matters of public inter-

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<sup>1</sup> A similar situation was presented, but not so clearly solved, in the well-known case of *Littlejohn v. Greeley*, 13 Abb. Pr. (N. Y.) 41, where the imputation was that the plaintiff "was prominent in the corrupt legislation of last winter," and the facts upon which the imputation was based did not appear in the article but were set forth in the answer. See also *Crows Nest Pass Coal Co. v. Bell*, 4 Ont. L. R. 660, and *Champagne v. Beauchamp*, 31 L. Can. J. 144. But see *Lefroy v. Burnside*, 4 L. R. Ir. 556, where the case was decided on other grounds on demurrer to a plea setting forth the facts upon which the inference was based.

<sup>2</sup> *Lefroy v. Burnside*, 4 L. R. Ir. 556; *Hunt v. Star Newspaper Co.*, [1908] 2 K. B. 309, per Fletcher-Moulton, L. J.; *O'Brien v. Salisbury*, 54 J. P. 215; *Cooper v. Lawson*, 8 A. & E. 746; *Speight v. Syme*, 21 Vict. L. R. 672. An imputation of motive is a statement of fact. *Davis v. Shepstone*, 11 A. C. 187; *Hunt v. Star Newspaper Co.*, *supra*.

<sup>3</sup> Comment is the generic term. Criticism has been most commonly used in connection with literary productions, but it has also been incorrectly used in this country for derogatory statements of fact. Since comment, in the law of defamation, implies derogatory comment, this term conveys the meaning attaching to criticism in ordinary parlance, and avoids the limitation and error resulting from the latter designation. Discussion is a term broad enough to include all the elements of comment — if, indeed, it is not subject to misconception as including both fact and comment, and thus including too much.

est being, therefore, an expression of opinion or judgment, and so incapable of definite proof, he who expresses it is not required by law to justify it as true, but is free to express it even though others dissent, provided his own expression is "fair," as the English cases invariably describe it. The constituent elements of the immunity are few and simple. In the first place, in order to give room for the plea of fair comment the facts commented upon must be truly stated.<sup>1</sup> This is little more than a restatement of the distinction upon which the immunity is based; the very statement of the doctrine assumes that the facts commented upon must be ascertained.

"The error which is usually committed by those who bring themselves within the law of libel when commenting on conduct is in thinking that they are commenting when in point of fact they are misdescribing. Real comment is merely the expression of opinion. Misdescription is matter of fact. If the misdescription is such an unfaithful representation of a person's conduct as to induce people to think that he had done something dishonorable, disgraceful, or contemptible, it is clearly libelous. To state accurately what a man has done, and then to say that in your opinion such conduct is disgraceful or dishonorable, is comment which may do no harm,

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<sup>1</sup> In the following cases there was an absence or failure of proof of the facts upon which the comment purported to be based, and the plea of fair comment was therefore denied: *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. 627; *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K. B. 292; *South Hetton Coal Co. v. North Eastern News Assn.*, [1894] 1 Q. B. 133; *Merivale v. Carson*, 20 Q. B. D. 275; *Davis v. Shepstone*, 11 A. C. 187; *R. v. Flowers*, 44 J. P. 377; *R. v. Carden*, 5 Q. B. D. 1; *Purcell v. Sowler*, 2 C. P. D. 215; *Risk Allah Bey v. Whitehurst*, 18 L. T. 615; *Harle v. Catherall*, 14 L. T. 801; *Hibbins v. Lee*, 4 F. & F. 243; *Morrison v. Belcher*, 3 F. & F. 614; *Campbell v. Spottiswoode*, 3 B. & S. 769; *Popham v. Pickburn*, 7 H. & N. 891; *Gathercole v. Miall*, 15 M. & W. 319; *Cooper v. Lawson*, 8 A. & E. 746; *Stuart v. Lovell*, 2 Stark. 93; *Tabart v. Tipper*, 1 Camp. 350; *Hubbard v. Allyn*, 200 Mass. 166; *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238; *Haynes v. Clinton Printing Co.*, 169 Mass. 512; *Hay v. Reid*, 85 Mich. 296; *Belknap v. Ball*, 83 Mich. 583; *Foster v. Scripps*, 39 Mich. 376; *Scripps v. Foster*, 41 Mich. 742; *Martin v. Paine*, 69 Minn. 482; *Cooper v. Stone*, 24 Wend. (N. Y.) 434; *Fry v. Bennett*, 3 Bosw. (N. Y.) 200, 5 Sandf. (N. Y.) 54; *Bee Publishing Co. v. Shields*, 68 Neb. 750; *Farley v. McBride*, 103 N. W. 1036 (Neb.). See also the statement in *Vance v. Louisville Courier Journal*, 95 Ky. 41, and *Howarth v. Barlow*, 113 N. Y. App. Div. 510; *Lefroy v. Burnside*, 4 L. R. Ir. 556; *Christie v. Robertson*, 10 New South Wales L. R. 157; *Browne v. M'Kinley*, 12 Vict. L. R. 36, 240; *Stewart v. McKinley*, 11 Vict. L. R. 802 (where the proof was supplied by the plaintiff); *Williams v. Spowers*, 8 Vict. L. R. (L.) 82; *Broadbent v. Small*, 2 Vict. L. R. (L.) 121. *Smiley v. McDougall*, 10 Up. Can. Q. B. 113. The point is fully discussed in *Hunt v. Star Newspaper Co.*, [1908] 2 K. B. 309; *Walker v. Hodgson*, [1909] 1 K. B. 239, and *Digby v. Financial News*, [1907] 1 K. B. 502.



as every one can judge for himself whether the opinion expressed is well founded or not. Misdescription of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no opportunity for judging himself for the character of the conduct condemned, nothing but a false picture being presented for judgment."<sup>1</sup>

If it were permissible to invent facts, and then to comment on the facts so invented in what would be a fair manner on the supposition that the facts were true, any discussion of a matter of public interest might, through fanciful suggestions of all sorts of imaginary misconduct by way of pretended illustration, be made the vehicle of the most defamatory allegations without the slightest foundation.<sup>2</sup> But the law does not permit the absurdity of thus allowing a person to be libelled, and then commented upon.<sup>3</sup> If the facts upon which the comment purports to be made are not proved or admitted to be true, the foundation of the plea of fair comment fails.<sup>4</sup>

In the next place, the comment must be susceptible of being an inference or deduction from facts truly stated. That is to say, it must not introduce new and independent defamatory matter, or draw inferences or conclusions wholly irrelevant, or out of all proportion, to the given facts which supply the basis of the comment. And, above all, it must not attack the character or motives of the author of the thing criticized, whether that thing be public conduct or published work, except in so far as such private character or personal motives have of necessity, or by the act of the author, become part of the subject of public interest commented upon; it must not reflect upon him otherwise than as the author of, or the person responsible for, or concerned in, or connected with the particular conduct, work, or thing which constitutes the subject of the comment.<sup>5</sup> Next to mis-

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<sup>1</sup> *Christie v. Robertson*, 10 New South Wales L. R. 157.

<sup>2</sup> *Lefroy v. Burnside*, 4 L. R. Ir. 556; *Broadbent v. Small*, 2 Vict. L. R. (L.) 121.

<sup>3</sup> *R. v. Carden*, 5 Q. B. D. 1, *per* Cockburn, C. J.

<sup>4</sup> In *O'Brien v. Salisbury*, 54 J. P. 215, it is said that comment may be "a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed. For further particulars concerning the justification of the facts upon which the comment is based see *Speight v. Syme*, 21 Vict. L. R. 672. "When one person alleges and another comments this reason does not apply, especially when the allegation, as distinct from the comment, is made in a privileged document." *Mangena v. Wright*, 100 L. T. 960.

<sup>5</sup> *Bower*, 117. "It is not because a public writer fancies that the conduct of a public

statement of facts, personal imputation is the principal cause of danger and disaster to criticism, and, as we shall see, it is the source of much of the confusion which exists in the statement of the law.

If comment conforms to the foregoing requirements the critic brings himself *primâ facie* within the immunity. But the occasion exists for a well-defined public purpose, and if the plaintiff can prove that the defendant, although *primâ facie* within the immunity, was nevertheless using the occasion for some ulterior and improper purpose, he thereby displaces the immunity, and the defendant is liable, just as he would have been if he had never brought himself within the right.<sup>1</sup> Having regard to the reasons for which the occasion exists, the most obvious proof for this purpose would be circumstances tending to show that the opinion expressed in the comment was not the defendant's genuine opinion;<sup>2</sup> or that he had no opinion at all on the

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man is open to suspicion of dishonesty, he is therefore justified in assailing his character as dishonest." *Campbell v. Spottiswoode*, 3 B. & S. 769, *per* Cockburn, C. J. In *Lefroy v. Burnside*, 4 L. R. Ir. 556, it was held on demurrer that the fact that a man had the means of committing a crime, and the crime being in fact committed, would not warrant the inference that he who had the means was the criminal. The same point is involved in cases which hold that it is not fair comment to assume that a person accused of crime is guilty. *Haynes v. Clinton Printing Co.*, 169 Mass. 512; *Commercial Publishing Co. v. Smith*, 149 Fed. 704. The following cases illustrate the general rule from various points of view: *Joynt v. Cycle Trade Pub. Co.*, [1904] 2 K. B. 292; *Hunt v. Star Newspaper Co.*, [1908] 2 K. B. 309; *Dakhyl v. Labouchere*, [1908] 2 K. B. 325, n.; *R. v. Calthorpe*, 27 J. P. 581; *Cooper v. Lawson*, 8 A. & E. 746; *Speight v. Syme*, 21 Vict. L. R. 672; *Browne v. M'Kinley*, 12 Vict. L. R. 36, 240; *Broadbent v. Small*, 2 Vict. L. R. (L.) 121; *Christie v. Robertson*, 10 New South Wales L. R. 161; *Reade v. Sweetzer*, 6 Abb. Pr. N. S. (N. Y.) 79, n.; *Edsall v. Brooks*, 17 Abb. Pr. 21; *Farley v. McBride*, 74 Neb. 49; *Wilcox v. Moore*, 69 Minn. 49; *Scripps v. Foster*, 41 Mich. 742; *Neeb v. Hope*, 111 Pa. 145.

<sup>1</sup> That the *primâ facie* protection accorded to fair comment, is, as in the analogous case of fair reports (*Stevens v. Sampson*, 5 Ex. D. 53), liable to be displaced by malice, is settled by the judgment of the Court of Appeal in *Thomas v. Bradbury, Agnew, & Co.*, [1906] 2 K. B. 627. Comment is therefore as much a species of conditional immunity as any of the communications usually described as qualifiedly privileged. "If the analysis be strictly carried out it will be found that the two rights, whatever name they are called by, are governed by the same rules." The contrary view involves the assertion that comment is absolute and wholly outside the ordinary law of libel. *Thomas v. Bradbury*, *supra*; *Henwood v. Harrison*, L. R. 7 C. P. 606, *per* Willes, J.; *McQuire v. Western Morning News*, [1903] 2 K. B. 100. For statements of that view see *Campbell v. Spottiswoode*, 3 B. & S. 769, *per* Blackburn and Crompton, JJ.; *Merivale v. Carson*, 20 Q. B. D. 275.

<sup>2</sup> According to the well-established rule with respect to privileged publications there is no immunity in the publication of statements not believed to be true, or known to be false; so in the case of fair comment the absence of any genuine belief in the justice of the comment is conclusive proof of malice, for no one can have a proper motive



subject of the comment, or otherwise published it without any belief that it was just, and in reckless indifference as to whether it was just or unjust.<sup>1</sup> If, however, such honest belief in the justice of the comment existed in fact, it is wholly immaterial whether, in an intellectual sense, it was sound or unsound, convincing or irrational,<sup>2</sup> unless it can be proved by independent evidence that such belief, though genuinely entertained, was itself created by malice.<sup>3</sup>

It is obvious, therefore, that the term "fair," as used in the English cases, merely excludes those elements which prevent the comment from falling within, or take it out of, the immunity arising from the occasion.<sup>4</sup> But in so far as facts are assumed as the basis of the criticism, or untrue allegations of fact are introduced in the course of it, or personal imputations are made not arising out of it, the pretended criticism is not criticism at all. It is not a question of its title to the epithet "fair," or to any other epithet; it does not answer to the description of comment, and is defamation pure and simple. Where, on the other hand, it is proved by the plaintiff that the comment, though on the face of it answering to the description, was nevertheless the ex-

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for making comments which he does not believe to be warranted. See *Thomas v. Bradbury*, *supra*. The malice which actuates comment need not necessarily be directed against the plaintiff. *Stuart v. McKinley*, 11 Vict. L. R. 802.

<sup>1</sup> *Morrison v. Belcher*, 3 F. & F. 614; *Hedley v. Barlow*, 4 F. & F. 224; *Risk Allah Bey v. Whitehurst*, 18 L. T. 615.

<sup>2</sup> "Belief is none the less belief because it is unreasonable. The immunity which the law confers in the first instance on certain kinds of publication in certain circumstances is not displayed by proof of the defendant's folly or stupidity, but only by proof of his bad faith. Unless the protection extends to the blunderer as well as to the sensible person, it is no protection at all. The law is the same in the analogous class of actions known as deceit, where to prove that the defendant made the incriminated statement on insufficient grounds is no proof of fraud, and in actions for malicious prosecution, where the absence of reasonable and probable cause is a distinct element from, and not the same thing in other words as, malice. But, just as in actions of deceit the unreasonableness of the belief, if it existed, may be so glaring that a jury is justified in inferring that the alleged belief could never in fact have existed, and, as in actions for malicious prosecution, the irrationality and carelessness of the charge, if made in good faith, may be of such an extraordinary nature as to justify a jury in inferring that the good faith could never have existed; so, in actions of defamation, the jury are warranted in imputing a certain minimum of intelligence to the defendant, and are at liberty to reject the contention that he believed what he professed to believe from sheer irrationality, and adopt the other hypothesis that he did not believe it at all." *Bower*, 165 (f); *Clark v. Molyneux*, 3 Q. B. D. 237; *McQuire v. Western Morning News*, [1903] 2 K. B. 100.

<sup>3</sup> *Wason v. Walter*, L. R. 4 Q. B. 73.

<sup>4</sup> *McQuire v. Western Morning News*, [1903] 2 K. B. 100.

pression of an opinion which the critic did not in fact entertain or was otherwise actuated by malice, it is sufficient to say that the protection is lost; there is no occasion to speak of fairness or unfairness. Everything that is involved in the rule prescribing fairness, would equally be contained in any rule which, omitting the term altogether, simply prescribed that the publication of any defamatory matter which is wholly and solely comment on the public conduct or published work of another is the subject of an immunity defeasible only on proof of malice. It is clear that what is meant by "fairness" is neither more nor less than the absence of malice,<sup>1</sup> and the burden being on the plaintiff to allege and prove the existence of malice, as well as the fact that it prompted the comment, and not on the defendant to allege and prove its absence, or to negative any suggestion that his comment was actuated thereby, the use of a positive word in connection with comment is seen to be not only unnecessary, but most deceptive, inasmuch as it imports the necessary presence of an affirmative quality as the condition of immunity, whereas it is the existence and influence of its opposite which is the necessary condition of that immunity being displaced.<sup>2</sup>

On a plea of fair comment the burden is on the defendant to prove all the facts necessary to bring the case within the foregoing requirements. He must satisfy the court that the subject of the comment is a matter of public importance, and must establish that the matter, on its face, is comment, unadulterated with any of those alien elements which are sufficient to prevent its coming within the province of fair comment.<sup>3</sup> If the plaintiff desires to show that the *prima facie* immunity, innocent as it appears to be on the surface, was in fact actuated by malice, the burden is on him to prove this.<sup>4</sup> Whether the subject is one of public interest,<sup>5</sup> and whether there is any evidence of the defamatory matter constituting or not constituting fair comment,<sup>6</sup> are

<sup>1</sup> "The word 'fair' is used with reference to malice." *Hedley v. Barlow*, 4 F. & F. 224, *per* Cockburn, C. J.

<sup>2</sup> Bower, 119, 388-390. Mr. Bower's discussions of the terminology of the law of defamation are of the highest value.

<sup>3</sup> *Walker v. Hodgson*, [1909] 1 K. B. 239, *per* Vaughan-Williams, L. J.

<sup>4</sup> *McQuire v. Western Morning News*, [1903] 2 K. B. 100.

<sup>5</sup> *Dakhyl v. Labouchere*, [1908] 2 K. B. 325, n.

<sup>6</sup> *Dakhyl v. Labouchere*, [1908] 2 K. B. 325, n., *per* Lord Atkinson; *Henwood v. Harrison*, L. R. 7 C. P. 606, *per* Willes, J.; *South Hetton Coal Co. v. N. E. News Assn.*, [1894] 1 Q. B. 133, *per* Lopes, L. J.; *McQuire v. Western Morning News*, [1903] 2 K. B. 100; *O'Brien v. Salisbury*, 54 J. P. 215; *Cooper v. Lawson*, 8 A. & E. 746; *McBee v. Fulton*, 47 Md. 403.



questions of law.<sup>1</sup> All other issues in relation to a plea of fair comment are questions of fact.<sup>2</sup>

<sup>1</sup> There are, therefore, two distinct checks upon the action of a jury in the case of fair comment. They are not at liberty to find for the plaintiff because they think that the matter was not of public interest, nor are they at liberty to find for the plaintiff on the ground that the comment is unfair unless the court is first satisfied that there is sufficient evidence of unfairness to justify such a finding.

<sup>2</sup> If the principles upon which the doctrine of fair comment rests are of general application, it is plain that the question to be decided is, not whether the inference seems sound to the jury, but whether it could honestly seem so to the defendant. But there has been a marked tendency on the part of judges to avoid the purely negative aspect of the term "fair," and to make a distinction in kind, rather than in degree, between literary criticism and comment on public acts. In the case of literary criticism it has been made plain that juries have no right to substitute their own opinion for that of the critic. *McQuire v. Western Morning News*, [1903] 2 K. B. 100; *Merivale v. Carson*, 20 Q. B. D. 275. With respect to personal imputations, the modern cases quite generally rely upon the statement made by Cockburn, C. J., in *Campbell v. Spottiswoode*, 3 B. & S. 769; "I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable." This distinguished judge explained and amplified this statement in several succeeding cases. *R. v. Calthorpe*, 27 J. P. 581; *Morrison v. Belcher*, 3 F. & F. 614; *Hedley v. Barlow*, 4 F. & F. 224; *Woodgate v. Rideout*, 4 F. & F. 202; *Hunter v. Sharp*, 4 F. & F. 983; *Risk Allah Bey v. Whitehurst*, 18 L. T. 615, and *Wason v. Walter*, L. R. 4 Q. B. 93. But only in *Morrison v. Belcher* did he state the doctrine in unequivocal terms: "The law laid down by the court . . . in *Campbell v. Spottiswoode* . . . was this: It was not because a public writer might not be able to prove to the letter all he had stated that, therefore, he was liable; but the jury must be of opinion that his observations and inferences were fair and legitimate under the circumstances; or [rather?] that they were not so unfair as to be reckless, and thus, in law, malicious." The confusion appears in the recent case of *Hunt v. Star Newspaper Co.*, [1908] 2 K. B. 309, where the Court of Appeal reversed a judgment because the trial judge had charged the jury in a manner which seemed to imply that that could not be fair comment which imputed improper conduct. The three judges constituting the court expressed the rule in different ways. According to Cozens-Hardy, M. R., the question was whether the comment "was fair and such as might, in the opinion of the jury, be reasonably made." As stated by Buckley, L. J., it was whether the comment "was in their opinion beyond that which a fair man, however extreme might be his views in the matter, might make honestly and without malice, and which was not without foundation. . . . Whether the criticism be upon a literary production or the conduct of a public man, it is for the jury, I think, to find whether the imputation based upon facts truly stated does not honestly represent the opinion of the person who gives expression to it, and was not without foundation." Fletcher-Moulton, L. J., "thoroughly disagreed" with the argument "based mainly upon an application of the language of the judgment in *Merivale v. Carson* to the case of the imputation of corrupt or disgraceful motives to an individual, and the contention . . . that if, in his comment on facts, a writer attributed such motives to an individual, such comment was covered by a plea of fair comment

The foregoing states the force and effect of English law according to modern authority. At the same time, it must be admitted that it is not in entire accord with earlier cases, nor are the modern authorities in entire agreement; and it would be idle to say that the subject is free from difficulty. The divergence of opinion and the difficulty occur at the point where certainty is most needed — where imputations of motive are made. So far as the imputation of motives is concerned, it is obvious that the early cases of literary criticism furnished a misleading precedent. In the field of literary and artistic criticism, where the expression of thought and imagination, and not the manifestation of will and character in action, is the subject of public interest, and where, therefore, there is hardly ever any necessity for dealing with personality at all, it is of course much easier to draw the line of demarcation between what is and what is not "fair." Although in the early history of literature it was customary to discuss the personality of authors as freely as their books, it is now recognized that such a course can rarely be necessary or permissible. As regards acts and conduct, on the other hand, criticism is often necessarily personal. It is quite possible, in most cases, that the critic should only criticize the person indirectly in connection with the thing, and that whilst possibly denouncing the tendency, effect, or policy of a course of conduct, he should leave the motives and intention and character of the individual severely alone.<sup>1</sup> But on some occasions it must be recognized that the individual has submitted the latter to

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unless the views it expressed could not be held by any fair man, however prejudiced he might be, and however exaggerated and obstinate his views. . . . The law laid down by the decision in that case has . . . nothing to do with personal libels, such as the imputation of disgraceful motives to an individual. . . . Comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation. . . . In other words, a libelous imputation is not warranted by the fact unless the jury hold that it is a conclusion which ought to be drawn from those facts. Any other interpretation would amount to saying that, where facts were only sufficient to raise a suspicion of criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English law. To allege a criminal intention or a disgraceful motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence." Compare, also, *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, with *Walker v. Hodgson*, [1909] 1 K. B. 239.

<sup>1</sup> For illustrations of the border line between impersonal and personal criticism, see *Paris v. Levy*, 9 C. B. N. s. 342; *Turnbull v. Bird*, 2 F. & F. 508; *O'Brien v. Salisbury*, 54 J. P. 215; *Campbell v. Spottiswoode*, 3 F. & F. 421; *Reade v. Sweetzer*, 6 Abb. Pr. N. s. 79, n.; *Boal v. Scottish Catholic Printing Co.* (1907), Scotch Ct. Sess. Cas. 1120. See Bower, App. XII, sec. 5.



public discussion. A candidate for an office of public trust, for instance, necessarily puts his personal character in issue so far as it pertains to his qualifications for the office he seeks. While this view has not met with universal acceptance, it seems clear that the fundamental error of any other doctrine consists in the assumption that the private character of a public officer is something aside from, and not entering into or influencing, his public conduct; that a thoroughly dishonest person may be a just administrator, and that a judge who is corrupt and debauched in other relations of life may still be pure and upright in his judgments; in other words, that an evil tree is as likely as any other to bring forth good fruit.

"Any such assumption is false to human nature, and contrary to general experience; and whatever the law may say, the general public will still assume that a corrupt life will influence public conduct, and that a man who deals dishonestly with his fellows as individuals will not hesitate to defraud them in their aggregate and corporate capacity, if the opportunity shall be given him. They are therefore interested in knowing what is the character of their public servants, and what sort of persons are offering themselves for their suffrages. And if this be so, it would seem that there should be some privilege of comment; that that privilege could only be limited by good faith and just intention; and that of these it was the province of the jury to judge, in view of the nature of the charges made, and the reasons which existed for making them."<sup>1</sup>

In early English cases involving literary criticism it was asserted in broad terms that no personal imputation was permissible, and this precedent was occasionally followed in similar terms in cases of comment on public acts and conduct. But the foundation of the modern law on this, as on so many other details of the general sub-

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<sup>1</sup> Cooley, *Const. Lim.* 440. See also *Bruce v. Leisk*, 19 R. 482 (Sc.), where, in protecting an elector who had falsely charged a candidate in a municipal election with having been bankrupt, and that it was a dishonest and disreputable failure, and that the pursuer was in consequence an unsuitable person to represent the electors, Lord President Robertson said: "It may well be said that a man who has been bankrupt once may become bankrupt again; at all events, that if a person who has not been bankrupt were standing, he was more eligible than a person who had been. It may be said, also, that the facts indicate a want of success in business not encouraging to electors asked to entrust a man with their business; and when we come to the most invidious part of the statement — that it was a dishonest and disreputable failure — that would seem to be highly relevant to the question whether, the office vacant being an office of trust and high public responsibility, the choice of the electors would fitly fall upon a person who had gone through these vicissitudes."

ject, is to be found in the decisions of Chief Justice Cockburn, from 1862. It had been held as late as 1840, by the Court of Exchequer,<sup>1</sup> that though some words which are clearly libelous of a private person may not amount to a libel when written of a person in a public capacity, still, any imputation of unjust or corrupt motives is equally libelous in either case. Six years later the same court perceived a distinction between comments on a man's public and his private conduct, but confessed that it could "hardly tell what the limits of it are."<sup>2</sup> In his first judicial utterance on the subject, however, Chief Justice Cockburn stated the true doctrine in unimpeachable terms.

"He differed from the learned counsel for the plaintiff when it was contended that under no circumstances could private conduct form a proper subject of observation for a public writer. Mr. Seymour did not occupy the position of a private individual, nor was it as a private individual that his conduct was made the matter of inquiry. . . . Under these circumstances it was impossible to say that he was not a public man, and that his conduct, if it had reference to his fitness to be a public man and to occupy a public position, was not a fair subject of debate. Mr. Seymour held a position in which integrity, honesty, and honor were essential, and if in his private conduct he showed himself destitute and devoid of those essential qualities, surely it could not be said that it was not a fair matter for public animadversion, so long as the writer kept within the bounds of truth and the limits of just criticism."<sup>3</sup>

Whatever uncertainty may characterize some of the intervening cases, it is now established by recent English cases that "a personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts; in other words, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried; but if he should

<sup>1</sup> *Parmiter v. Coupland*, 6 M. & W. 105, *per* Parke, B.

<sup>2</sup> *Gathercole v. Miall*, 15 M. & W. 319, *per* Alderson, B.

<sup>3</sup> *Seymour v. Butterworth*, 3 F. & F. 614. In *Campbell v. Spottiswoode*, 3 B. & S. 769, the same judge stated the law to be that "where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable." And in *Wason v. Walter*, L. R. 4 Q. B. 93, he referred to the fact that "the full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized."



rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn."<sup>1</sup>

In this country the weight of judicial *dicta* is undeniable contrary to the English view. In the majority of the cases commonly cited in this connection no distinction between comment and statement of fact is made or involved in the actual determination. They are, almost without exception, cases involving direct statement as distinguished from comment; or, if involving any comment at all, no basis for the comment was proved, and privilege was claimed simply by virtue of the occasion being a matter of public interest.<sup>2</sup> These cases are not, therefore, in opposition to the English rule, for they were not cases of comment properly so called, and privilege would have been equally denied under that rule. They are simply authority for the rule that a direct statement of fact is not privileged by reason of the publicity of the occasion.<sup>3</sup> The difficulty is that these decisions have generally gone beyond the actual issue, and, often using the term "criticism" as synonymous with derogatory statements of fact, have expressed the *dictum* that criticism is privileged, or not actionable, so long as it does not attack the private character of the person criticized, or impute evil motives. In other words, while the actual decision is generally unimpeachable, the foundation is delusive, *i. e.*, a distinction between different kinds of imputation, whereas the true distinc-

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<sup>1</sup> *Dakhyl v. Labouchere*, [1908] 2 K. B. 325, n., *per* Lord Atkinson; *Hunt v. Star Newspaper Co.*, [1908] 2 K. B. 309; *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K. B. 292; *Walker v. Hodgson*, [1909] 1 K. B. 239; *Odger v. Mortimer*, 28 L. T. 472; *Hunter v. Sharp*, 4 F. & F. 983; *De Mestre v. Syme*, 9 Vict. L. R. (L.) 10.

<sup>2</sup> In addition to the cases cited in note 1, on page 433, see *Murray v. Galbraith*, 109 S. W. 1011 (Ark.); *Martin v. Paine*, 69 Minn. 482; *Austin v. Hyndman*, 119 Mich. 615; *Owen v. Dewey*, 107 Mich. 67; *Hay v. Reid*, 85 Mich. 296; *Belknap v. Ball*, 83 Mich. 583; *McAllister v. Free Press Co.*, 76 Mich. 338; *Wheaton v. Beecher*, 66 Mich. 307; *Baurreseau v. Evening Journal Co.*, 63 Mich. 425; *Bronson v. Bruce*, 59 Mich. 467; *Peoples v. Detroit Post*, 54 Mich. 457; *Scripps v. Foster*, 41 Mich. 742; *Foster v. Scripps*, 39 Mich. 376; *Farley v. McBride*, 74 Neb. 49; *Bee Pub. Co. v. Shields*, 68 Neb. 750; *Mattice v. Wilcox*, 147 N. Y. 624; *Hamilton v. Eno*, 81 N. Y. 116; *Fry v. Bennett*, 3 Bosw. 200, 5 Sandf. 54; *Cooper v. Stone*, 24 Wend. 434; *Lewis v. Few*, 5 Johns. 1; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *San Antonio Light Pub. Co. v. Lewy*, 113 S. W. 574 (Tex.); *Post Publishing Co. v. Hallam*, 16 U. S. App. 613; *Eviston v. Cramer*, 57 Wis. 570; *Spiering v. Andrac*, 45 Wis. 330; *Wofford v. Meeks*, 129 Ala. 349. See also *Munro v. Quigley*, 30 Nov. Sco. R. 360.

<sup>3</sup> And some of them stop there. See *Post Publishing Co. v. Hallam*, 16 U. S. App. 613, and other cases cited in note 3 on page 419.

tion is between comment and statement of fact.<sup>1</sup> While this doctrine recognizes some latitude in the discussion of matters of public interest, its practical futility is shown by the conflicting and sometimes fanciful ideas of the sort of imputations which are held to fall within it.<sup>2</sup> But

<sup>1</sup> The leading cases are *Dauphiny v. Buhne*, 96 Pac. 880 (Cal.); *Star Publishing Co. v. Donahoe*, 58 Atl. 513 (Del.); *Jones v. Townsend*, 21 Fla. 431; *Negley v. Farrow*, 60 Md. 158; *Hamilton v. Eno*, 81 N. Y. 116; *Upton v. Hume*, 24 Ore. 420; *Banner Pub. Co. v. State*, 16 Lea (Tenn.) 176; *Smith v. Tribune Co.*, 4 Biss. (U. S.) 477; *Russell v. Washington Post*, 31 App. D. C. 277; *Sweeney v. Baker*, 13 W. Va. 158. This view is also taken in *Tanner v. Embree*, 99 Pac. 547 (Cal.); *Jarman v. Rea*, 137 Cal. 339; *People v. Fuller*, 238 Ill. 116; *Rearick v. Wilcox*, 81 Ill. 77; *Luzenberg v. O'Malley*, 116 La. 699; *Fitzpatrick v. Daily Star Pub. Co.*, 48 La. 1116; *Bearce v. Bass*, 88 Me. 521; *Wheaton v. Beecher*, 66 Mich. 307; *Bronson v. Bruce*, 59 Mich. 467; *Smith v. Burrus*, 106 Mo. 94; *Post Publishing Co. v. Maloney*, 50 Oh. St. 71; *Todd v. Publishing Co.*, 29 Oh. Cir. Ct. Rep. 155; *Mayrant v. Richardson*, 1 Nott & McCord (S. C.) 347; *Brewer v. Weakley*, 2 Overton (Tenn.) 176; *Forke v. Homann*, 14 Tex. Civ. App. 670; *McDonald v. Woodruff*, 2 Dillon (U. S.) 244. Many of the Pennsylvania cases seem to take practically the same view. *Wallace v. Jameson*, 179 Pa. 98; *Wood v. Boyle*, 177 Pa. 620; *Conroy v. Pittsburgh Times*, 139 Pa. 334; *Neeb v. Hope*, 111 Pa. 145; *Barr v. Moore*, 87 Pa. 387; *Pitcock v. O'Neill*, 63 Pa. 253. See also *Edwards v. San José, etc. Co.*, 99 Cal. 431; *Clifton v. Lange*, 108 Ia. 472; *Cotulla v. Kerr*, 74 Tex. 89; *Byrne v. Funk*, 38 Wash. 506; *Com. v. Wardwell*, 136 Mass. 164; *Lent v. Underhill*, 54 N. Y. App. Div. 609; *Benton v. State*, 59 N. J. L. 551.

<sup>2</sup> In *Negley v. Farrow*, 60 Md. 158, it is asserted that "there is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man, and the imputation of corrupt motives by which that conduct may be supposed to be governed." In *Sweeney v. Baker*, 13 W. Va. 158, the distinction is said to be between the acts and conduct of a candidate for office and his moral character. The usual distinction is between public acts and private character, and a favorite quotation is a passage from *Post Pub. Co. v. Maloney*, 50 Oh. St. 71, to the effect that "a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property." The fitness and qualifications of a candidate, as shown by his acts and conduct, are commonly admitted to be subject to comment and criticism, but not such as impute moral delinquency. *Jones v. Townsend*, 21 Fla. 431; *Upton v. Hume*, 24 Ore. 420. "A person cannot be untruthful, profane, or a libertine in his official capacity. These are attributes of his moral character as a man, not as an officer, although they may render him unfit to hold the office." *Com. v. Wardwell*, 136 Mass. 164. "It is true that when a person becomes a candidate for a public office, his talents and qualifications for the office to which he aspires may be fully commented on and criticized by any member of the community, by publication or otherwise. His faults and his vices, in so far as they may affect his official character, may be freely discussed. He does not, however, by becoming a candidate, surrender his private character as a subject for false accusation. That character is only put in issue as far as his fitness or qualification for the office he seeks may be affected by it." *Dauphiny v. Buhne*, 96 Pac. 880 (Cal.). And yet in this case the imputation was official corruption. The contradiction is as flat in *Tanner v. Embree*, 99 Pac. 547 (Cal.), *Forke v. Homann*, 14 Tex. Civ. App. 670, and *Wheaton v. Beecher*, 66 Mich. 307. In *Sweeney v. Baker*, 13 W. Va. 158, the court solemnly for-



this doctrine, so far as it is intelligible, would seem to leave little, if any, more practical freedom in the discussion of matters of public interest than that which is permitted in the discussion of the conduct of a private person. It leaves the law very much in the attitude of saying, "You have full liberty of discussion, provided, however, you say nothing that counts."

Other and more carefully considered cases are in substantial agreement with the prevailing English doctrine.<sup>1</sup> Perhaps the general course of the development of the law in this country may be best indicated by reference to the New York cases. The earliest case<sup>2</sup> on the general subject arose, in 1809, out of an address issued by opponents of the reelection of Morgan Lewis as governor of the state, charging him, among other things, with political apostasy, family aggrandizement in his appointments, signing the charter of a bank after notice that it had been procured by fraudulent practices, publishing doctrines unworthy of a chief magistrate, attempting to destroy the liberty of the press by vexatious prosecutions, etc. The defendant demurred to the plaintiffs evidence, claiming a constitutional privilege arising out of the occasion of the publication. The demurrer was very properly overruled, but the court said:

"That electors should have a right to assemble and freely and openly to examine the fitness and qualifications of candidates for public offices, and communicate their opinions to others, is a position to which I most cordially accede. But there is a wide difference between this privilege and a right irresponsibly to charge a candidate with direct and unfounded crimes. . . . Candidates have rights, as well as electors; and those rights and privileges must be so guarded and protected as to harmonize one with the other. . . . All that is required, in the one case or the other, is, not to transcend the bounds of truth. If a man has committed a crime, any one has a right to

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mulates the rule that comment must be confined to mental and physical qualifications. As a whole, these statements are about as luminous as the oracular utterance of the Supreme Court of Missouri in *Smith v. Burrus*, 106 Mo. 94: "Within the bounds of legitimate discussion, all that is necessary to say and proper to say respecting the actions and qualifications of candidates or public officers, may legitimately be said."

<sup>1</sup> *Howarth v. Barlow*, 113 N. Y. App. Div. 510; *McDonald v. Sun Printing & Pub. Co.*, 45 N. Y. Misc. 441; *Reade v. Sweetzer*, 6 Abb. Pr. n. s. 79, n.; *Hart v. Townsend*, 67 How. Pr. 88; *Eickhoff v. Gilbert*, 124 Mich. 353; *Dunneback v. Tribune Printing Co.*, 108 Mich. 75; *Belknap v. Ball*, 83 Mich. 583; *McBee v. Fulton*, 47 Md. 403; *Smith v. Higgins*, 16 Gray (Mass.) 251; *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238; *Mertens v. Bee Pub. Co.*, 5 Neb. (Unofficial) 592.

<sup>2</sup> *Lewis v. Few*, 5 Johns. 1.

charge him with it, and is not responsible for the accusation; and can any one wish for more latitude than this?"

This view was presented in a still stronger light twenty years later in a case<sup>1</sup> where a newspaper opposing the reelection of the lieutenant-governor of the state, charged him with being intoxicated while presiding in the senate chamber, giving in detail the circumstances on which the opinion was based. The publishers justified the charge as true, and produced witnesses, who had been present on the occasion in question, who testified that the statement was true. There was therefore good reason for supposing that the charge was made in the belief that it was true, and if it was true, there was abundant reason on public grounds for making the statement. But the jury, having been told that the only privilege the defendants had was "simply to publish the truth, and nothing more," found the preponderance of the evidence against the truth of the charge. In the Court of Errors and Appeals, where judgment for the plaintiffs was sustained, Walworth, C., said in reply to the defendants' claim of privilege:

"If so, the defendants were under no obligation to prove the truth of the charge; and the party libelled had no right to recover unless he established malice in fact, or showed that the editors knew the charge to be false. The effect of such a doctrine would be deplorable. Instead of protecting, it would destroy the freedom of the press, if it were understood that an editor could publish what he pleased against candidates for office without being answerable for the truth of such publication. No honest man could afford to be an editor; and no man, who had any character to lose, would be a candidate for office. . . . The only safe rule to adopt in such cases is to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding themselves responsible for the truth of what they publish."<sup>2</sup>

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<sup>1</sup> *King v. Root*, 7 Cow. 613, 4 Wend. 113.

<sup>2</sup> Compare this with *Davis v. Duncan*, L. R. 9 C. P. 396, where a similar imputation was sustained as fair comment. In *Coleman v. MacLennan*, 78 Kan. 711, the following allusion is made to this case: "What is a charge of intoxication — an inference from conduct and appearances and therefore fair comment, or the statement of a fact? What is the difference between the charge of intoxication and the following: 'Having appearances which were certainly consistent with the belief that they had imbibed rather freely of the cup that inebriates. Their condition in the chapel also led one to such a conclusion'? In England this statement is fair comment. *Davis v. Duncan*, L. R. 9 C. P. 396. In New York, no matter how strongly appearances and conduct may justify the inference, a charge of intoxication made against a public official must



In these two cases no privilege of discussion whatever, as springing from the relation of elector and candidate, is conceded in a civil action;<sup>1</sup> they are treated precisely as they would have been if no public consideration were in any way involved. It is difficult to understand how the privileges of electors, of which they speak, are protected by such a doctrine. These decisions treat the subject as if there were no middle ground between absolute immunity for falsehood and the application of the same strict rules which prevail in other cases.<sup>2</sup>

This narrow view of the law was not maintained. In *Hamilton v. Eno*,<sup>3</sup> although the earlier cases were not overruled, the matter is put upon entirely different grounds, apparently without any real appreciation of the departure. In this case it appeared that an assistant inspector of the board of health of the city of New York had made an official report recommending a certain kind of street pavement. The defendant thereupon published a statement asserting in effect that the statements in the report had been dictated by persons financially interested in the pavement, and that the inspector had received a reward from them for it. The defendant offered no proof of the charge, but claimed that, although it was defamatory and untrue, yet, if made without malice, it was privileged.

The court conceded that, "in a qualified way, the [privileged] occasion exists when there has been put forth a publication of general public interest, or the publication thus made in itself is one to which public interest has been invited. Then there is a right to make comment upon that publication. And like to this are the acts and conduct of public functionaries, and, of course, their official productions, when made public by themselves or in the due course of the public business. . . . Every citizen had a right to discuss the question as publicly as the report had done so. So that the time and mode of the publication of the defendant made the occasion of it thus far

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be fully proved. *King v. Root*, 4 Wend. 113." The answer to this inquiry is obvious. In both cases there was an imputation of intoxication as an inference from facts stated; but in one case the inference was protected as fair comment, while in the other it was held necessary to justify the inference as a fact.

<sup>1</sup> In *Com. v. Clap*, 4 Mass. 163, Chief Justice Parsons had, in 1809, admitted that, in criminal cases, a defendant who could prove the truth of his charges might be protected in some cases where he would not be if the person assailed was not appealing to public favor.

<sup>2</sup> See *Cooley, Constitutional Limitations*, 431 *et seq.*; *Eickhoff v. Gilbert*, 124 Mich. 353; *Express Co. v. Copeland*, 64 Tex. 354.

<sup>3</sup> 81 N. Y. 116 (1880).

privileged. Such an occasion must, however, be used fairly and in good faith, with a view to the public interest and good, and without evil or malicious motive. In the case at hand, there was the report of the plaintiff, and it was his report made officially. It was, therefore, the subject of criticism as a work upon a matter of public interest, and also as the act of an official person. As a work, the defendant might question its statements of fact and deny them, he might expose misrepresentations and point out errors; he might combat its reasoning and show its conclusions ill drawn; and he might do so with satire and ridicule, so long as he directed those missiles at the report and the contents of it. But he could not attack the private character of the author; to do so would be libellous. (*Cooper v. Stone*, 24 Wend. 442.) . . . We are of the opinion that the official act of a public functionary may be freely criticized, and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself; and that then the occasion will excuse everything but actual malice and evil purpose in the critic. We are of the opinion that the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer; and that to be excused, the critic must show the truth of what is uttered of that kind."

More guardedly worded is the judgment in *Mattice v. Wilcox*,<sup>1</sup> in which it appeared that, prior to a charter election for trustees of a village, the defendant published a circular dealing with general village topics, in the course of which he imputed to the plaintiff criminality in his office of assessor, and incompetence in his professional capacity as attorney for the village. In denying the defendant's broad claim of privilege, the court said:

"The defendant had the right at all times to communicate publicly by speech, or in writing, with the citizens of Oneonta regarding the general condition of municipal affairs. The approaching election for trustees was a peculiarly appropriate occasion for it. But the occasion did not excuse the defendant in making a personal and defamatory charge against the character of the plaintiff, nor was such a charge privileged within the meaning of the term as already defined. (*Hamilton v. Eno*, 61 N. Y. 116.) The defendant could not thus attack in an aspersive manner the private or professional character of the plaintiff; certainly not unless there were some fair or plausible reason for thus including and attacking it in the course of proper and appropriate criticism concerning the manner in which the affairs of the village had been conducted. We do not think the proof or the circumstances show there was any such reason; nor can it fairly or appropri-

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<sup>1</sup> 147 N. Y. 624 (1895).



ately be founded upon any or all of the facts proved by the defendant. If an individual choose to attack an officer and charge him with incompetency in his professional character and with criminality in his office as assessor (if the jury should so construe his language), he must be prepared, when brought into court, to prove the truth of his charge."

In *Triggs v. Sun Printing & Pub. Assn.*,<sup>1</sup> in overruling a demurrer to the complaint in a case where an author had been represented as a presumptuous literary freak, and his private life ridiculed, the court advanced a step further:

"It is contended by the respondent that the articles published were a mere comment or criticism of matters of public interest and concern, and, hence, were privileged. While every one has a right to comment on matters of public interest, so long as one does so fairly, with an honest purpose, and not intemperately and maliciously, although the publication is made to the general public by means of a newspaper, yet, what is privileged is criticism, not other defamatory statements, and if a person takes upon himself to allege facts otherwise actionable, he will not be privileged, however honest his motives, if those allegations are not true. It is true that an author when he places his work before the public invites criticism, and however hostile it may be, the critic is not liable for libel, provided he makes no misstatements of material facts contained in the writing and does not go out of his way to attack the author. The critic must, however, confine himself to criticism and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely for the purpose of exercising his powers of denunciation. If, under the pretext of criticizing a literary production or the acts of one occupying a public position, the critic takes an opportunity to attack the author or occupant, he will be liable in an action for libel. (*Cooper v. Stone*, 24 Wend. 434; *Mattice v. Wilcox*, 71 Hun 485, 488; affirmed 147 N. Y. 624; *Hamilton v. Eno*, 81 N. Y. 116.) . . . The single purpose of the rule permitting fair and honest criticism is that it promotes the public good, enables the people to discern right from wrong, encourages merit, and firmly condemns and exposes the charlatan and the cheat, and hence is based upon public policy. The distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow a public man into his private life or pry into his domestic concerns. It never attacks the individual, but only his work."

These three cases constitute a distinct departure from the earlier cases in that they recognize a privileged occasion arising out of the

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<sup>1</sup> 179 N. Y. 144 (1904).

public interest in the subject matter. But in the first case the court, not content with deciding that a direct defamatory charge is not privileged merely because of its public interest, and without appreciating the distinction between statement and comment, follows the *dictum* of the majority of the American cases in making an untenable distinction between personal and impersonal criticism. Manifestly, however, nothing could be more relevant or more important to the public interest than the fact, if there were any grounds for such an inference, that a public officer has been recreant to his trust. In the two succeeding cases a wider latitude of comment is merely suggested and then practically denied.

For the final stage of legal development in the direction of the true solution of the problem recourse must be had as yet to recent decisions of lower courts. In the case of *McDonald v. Sun Printing & Pub. Assn.*,<sup>1</sup> it appeared that the plaintiff had sought to secure the establishment by Congress of a "laboratory for the study of the abnormal classes," in furtherance of which he published a book entitled "Girls who Answer Personals," giving the result of his communication with young women who had given him accounts of their lives. The defendant characterized the conduct of the plaintiff and the book as shameless, prurient, and a scandal. The trial judge sent the case to the jury on the question whether the inferences of fact drawn by the defendant were reasonably possible, and, therefore, permissible.

"Any one who publishes a book, or does any public act, challenges discussion and criticism. Every one has the right to indulge in such discussion and criticism freely and fully, and to draw inferences and to express opinions on the facts in the same way. . . . In the present case the plaintiff is charged with pruriency, scandal, and shamelessness. This affects his personal character. If his book and his conduct lay him open to the charge, the defendant did not go outside the realm of criticism, and is not liable."

In *Howarth v. Barlow*,<sup>2</sup> it appeared that the clerk of a board of village trustees presented to the trustees for payment a number of bills against the village, among which one of the trustees discovered a bill for lumber purchased by the clerk for his individual use. This trustee placed the matter before the taxpayers' association of the village, which appointed him and the defendant a committee to present it to the grand jury. The defendant discussed the matter with the president of the

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<sup>1</sup> 45 N. Y. Misc. 442 (1904).

<sup>2</sup> 113 N. Y. App. Div. 510 (1906).



village, concluding with the statement, "Well, you see the intent. You should call for his resignation, and if he will resign there will be no further trouble." Reversing a judgment for the plaintiff, the court said:

"The plaintiff's whole official conduct in the matter was open to the fullest criticism, and the defendant and all other persons had the right to draw from it and express any opinions or inferences that could be drawn from it, although contrary, and it may be, more reasonable ones, could be drawn from it. That such opinions or inferences are far-fetched, high-strung, or severely moral, or contrary to other opinions or inferences that seem more reasonable, does not matter so long as there be a basis for them in the acts or words of the person who is the subject of such criticism. The majority or prevailing opinion is not the test of whether such opinions or inferences be permissible. The prevailing or majority opinion is often the wrong one. For that reason the law gives full latitude to the expression of any and all opinions on things of general concern. It does not matter that the opinions or inferences expressed are not the most charitable or reasonable ones, or that they are the wrong ones, provided they be based on the facts and the facts are capable of them. This is the rule and latitude of discussion and criticism of the conduct of every one who holds a public office, or writes a book, or does any act by which he invites public attention and criticism. The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government, but only in a despotism. On the contrary, they have a right to speak out in open discussion and criticism thereof, the only test being that they make no false statement; and this is the great safeguard of free government, and of pure government."

*Van Vechten Veeder.*

NEW YORK.

## NULLIFICATION BY INDIRECTION.

POSSIBLY the most novel and important contribution which the American people have made to the science of government is the constitution of the Supreme Court as a coördinate branch of the government with ample power to declare the meaning of the written compact and to nullify any law repugnant thereto. A novelty in 1787, it remains almost a rarity to-day. Neither in the constitution of the German Empire, closely as it approximates the federal Constitution in many respects, nor in the unwritten constitution of England, has there yet been constituted any court with such august and potential powers. While the highest court of the Swiss Confederation can declare a cantonal law invalid as repugnant to the constitution, it cannot thus adjudge void a federal law. Undoubtedly the framers of the Constitution were familiar with the great work of the English courts in putting an end to executive tyranny. Lord Camden's great decision on general warrants and that of Mansfield with reference to the outlawry of the turbulent Wilkes were, with them, political topics of foremost interest. The elder Chatham had even declared in the House of Lords that each member of the seemingly omnipotent House of Commons was liable to a civil action for not giving Wilkes his seat after his election, and while this opinion of the greatest statesman of his time was ridiculed by Mansfield, yet it had some support in the declaration of Lord Camden.

To the colonists especially the concept of the duty of the judiciary to nullify an *ultra vires* law was not altogether unfamiliar, for prior to the Constitution of 1787 questions had arisen in the colonial courts as to whether a law which had been passed in violation of a colonial charter was not a nullity. The first clear declaration of this judicial power was announced by the Superior Court of Judicature of Rhode Island in the famous case of *Trevett v. Weedon*, a year before the adoption of the federal Constitution, when that court invalidated a legislative statute on the ground that it operated to destroy the right of trial by jury, which had been secured to the litigant by the colonial charter, then become the constitution of the state. So novel and revolutionary seemed the action of the court, that the



judges who rendered this interesting decision were summoned before the legislative branch of the government and required to render their reasons for adjudging "an act of the General Assembly unconstitutional and so void," and they were only acquitted upon the ground that no charge of criminality had been referred against them.

To the framers of the Constitution, however, the theory of such judicial interference was very nebulous, for as late as 1825 so great a judge as John Bannister Gibson, in the case of *Easkin v. Raub*,<sup>1</sup> voicing the opinion of the Supreme Court of Pennsylvania, questioned the power of the judiciary in this respect. He boldly took issue with Chief Justice Marshall and claimed that it was "the business of the judiciary to interpret the laws, not scan the authority of the lawgiver"; he held "that it rests with the people in whom full and absolute sovereign power resides to correct abuses of legislation by instructing their representatives to repeal the obnoxious act."

As we know, it required all the commanding genius of John Marshall in the case of *Marbury v. Madison*<sup>2</sup> to establish upon a firm foundation the power and responsibility of the judiciary with respect to unconstitutional laws.

Too much cannot be said in praise of the cautious, conservative, and farsighted manner in which the Supreme Court — thus "the living voice of the Constitution" — has exercised this most delicate and important power.

All this, however, is apart from the real theme of the writer, which seeks to discuss the doctrine of the Supreme Court, as first announced in *Vesey v. Fenno*,<sup>3</sup> that the judiciary is without power to prevent the nullification of the rights of the states by the exercise of federal powers for unconstitutional purposes. It will be important to bear in mind the facts of the case with reference to which the decision was rendered. The Supreme Court had under consideration an internal revenue statute, whereby the taxing power of the federal government was deliberately used to destroy the circulating notes of state banks unquestionably issued under the reserved powers of the state. It was conceded that the tax was so excessive "as to indicate a purpose on the part of Congress to destroy the franchise of the bank." The Supreme Court might have rested its decision solely upon the ground that as the federal government had the power to provide a national currency and as it had undertaken

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<sup>1</sup> 12 S. & R. (Pa.) 330.

<sup>2</sup> 1 Cranch 137.

<sup>3</sup> 8 Wall. 533.

to do so, it had the incidental power to "restrain by suitable enactments the circulation, as money, of notes not issued under its own authority." But the Supreme Court went further and in the following words laid down the doctrine that it was powerless to prevent the nullification of state rights by a perversion of federal powers :

"The judiciary cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts but to the people by whom its members are elected."

This, it may be said in passing, was the very reasoning of Gibson in *Eaken v. Raub*. Such was not the doctrine of John Marshall and his illustrious associates, for the great Chief Justice, in *McCullough v. Maryland*,<sup>1</sup> said :

"Should Congress, *under the pretext of exercising its powers*, pass laws for the accomplishment of *objects* not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

Not only to Marshall, but to the framers of the Constitution and to the political philosophers from whom they drew their inspiration, the possibility of the exercise of an undoubted power for an illegitimate purpose and to accomplish an unlawful result was clearly recognized. In his *Discourses on Government*, Algernon Sidney had said that every governmental power should be employed "wholly for the accomplishment of the ends for which it was given." Thus, Hamilton, in *The Federalist* (No. 33), said :

"The propriety of a law in a constitutional light must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority (which, indeed, cannot be easily imagined) the federal legislature should attempt to vary the law of descent in any state, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the state? Suppose again that upon the pretense of an interference with its revenues it should undertake to abrogate a land tax imposed by the authority of the state, would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to these species of tax which the Constitution plainly supposes to exist in the state governments?"

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<sup>1</sup> 4 Wheat. 423.



In his great speech of April 30, 1824, which was not unworthy of the masterly reply which followed, Senator Hayne said that if Congress "may use a power granted for one purpose for the accomplishment of another and very different purpose, it is easy to show that a constitution on parchment is worth nothing."

Care must be taken to distinguish between the class of cases where the exercise of a federal power has an incidental, unintentional, but nevertheless destructive, effect upon some right of the people otherwise reserved, and the other class of cases where the exercise of federal power has been exercised, not for any object within the Constitution, but for the palpable and deliberate, and in some cases avowed, purpose of attaining some end that is not within the federal power. In our dual system of government, administered as it must be over a country that is for all commercial purposes and for many other purposes unified by the centripetal power of the railroad and the telegraph, it is inevitable that the exercise of many federal powers, such as the power to tax, must necessarily affect even to the point of destruction the exercise of state powers. As the state powers are necessarily subordinate to the paramount federal power, such destructive effects are constitutional. Marshall early recognized in the much quoted *dictum* that the power to tax was the power to destroy, and it was early recognized in the License Cases that the fact that the power to tax might involve the destruction of the trade in the thing taxed could not affect its constitutionality any more than a state prohibitory law would be unconstitutional, simply because its practical administration might deprive the federal government of revenues which it would otherwise secure. But while the distinction may not be easy to make in practice, yet there is a clear distinction between the exercise of a federal power with an incidental and unintentional effect upon some right of the states and the exercise of the same power with no real intent to effectuate any purpose of the federal government but simply to embarrass or destroy the rights of the states. Of the second class, the case of *Vesey v. Fenno* is a most striking illustration, for it cannot be gainsaid as an historical fact that the whole purpose of the prohibitive tax upon the currency notes of state banks was not to raise revenue but to prevent their emission. In *Austin v. The Aldermen* <sup>1</sup> the Supreme Court said:

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<sup>1</sup> 7 Wall. 694.

"The right of taxation where it exists is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

In *Treat v. White*<sup>1</sup> the court said, referring to the power of taxation:

"The power of Congress in this direction is unlimited."

A still more striking illustration of this permitted perversion of federal power is afforded by the case of *McCray v. The United States*,<sup>2</sup> decided in 1904. The court there had under consideration the constitutionality of the designedly prohibitive tax upon colored oleomargarine. It was well known that the dairy interests had persuaded Congress to pass a law which placed so prohibitive a tax upon oleomargarine, colored to imitate butter, as to make it difficult to sell it openly in competition with butter. Obviously no revenue was either sought for or expected. To drive artificial butter from the market was the avowed purpose of Congress. The Supreme Court, however, held that the judiciary could not

"inquire into the motive or purpose of Congress in adopting a statute levying an excise tax within its constitutional power."

The present Chief Justice, in the case of *In re Kollock*,<sup>3</sup> where a less offensive tax on oleomargarine was under consideration, said:

"The act before us is, *on its face*, an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object *must* be assumed to be the raising of revenue."

From these and other cases the doctrine is fairly deducible that where Congress passes a law in the exercise of one of its powers, the judiciary must conclusively assume that its purpose and object is to exercise that power, and no inquiry can be made into the true motive or purpose of Congress, however unconstitutional and improper and however destructive to the reserved rights of the states.

The same question again arose in the recent *Commodities Case*,<sup>4</sup> where it was strongly and persuasively argued to the court that the history of the legislation clearly showed that its purpose, although on its face a regulation of commerce, was not merely to regulate com-

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<sup>1</sup> 181 U. S. 264.

<sup>2</sup> 165 U. S. 526.

<sup>3</sup> 195 U. S. 27.

<sup>4</sup> 213 U. S. 366.



merce but to compel railroads which, under the laws of the states, had acquired coal mines, to sell their coal mines at whatever sacrifice, but the court preferred so to narrow the construction of the statute as to avoid the constitutional question thus presented. The pivotal constitutional question in the *Commodities Case*, however, was anticipated in the *Lottery Case*,<sup>1</sup> in which the power of Congress to prohibit altogether interstate traffic in a commodity on moral considerations was sustained after a prolonged forensic struggle and three oral arguments.

Upon the doctrine of the cases previously cited, the prohibition of interstate traffic, being an acknowledged federal power, could be used for any purpose or object, so far as judicial interference is concerned. If so, what becomes of the rights of the states?

From these decisions has grown a well-founded belief on the part of many eminent publicists and statesmen that the admitted powers of federal government can be freely exercised without judicial let or hindrance, even though used with the sole purpose of destroying rights which are concededly reserved to the states. Possibly the most striking illustration of this new doctrine of nullification by indirection will be found in the struggle that has continued since 1890 to destroy large industrial combinations. It is sometimes erroneously stated that the Sherman Anti-Trust Law was a piece of hasty and inconsiderate legislation. The very contrary is the fact. The first bill was introduced by Senator Sherman, August 14, 1888, and the statute was the composite result of many drafts and prolonged debate. In the Fiftieth Congress twenty bills were introduced; in the Fifty-first Congress twenty-three bills were introduced; in the Fifty-second Congress, sixteen; in the Fifty-third, seventeen; in the Fifty-fourth, eight; in the Fifty-fifth, eleven; in the Fifty-sixth, twenty-one; and in the first session of the Fifty-seventh, twenty-two. These bills excited prolonged discussion in both houses of Congress, and the debates comprised thousands of printed pages. Throughout all these discussions it was suggested again and again that if the federal power could not directly interfere with the formation and operations of large state corporations, that it could and should do so indirectly by so exercising federal powers as to make it impossible for the state corporations to exist when they reached the commercial dimensions of a so-called "trust." Thus, it was suggested that a destructive

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<sup>1</sup> *Champion v. Ames*, 188 U. S. 321.

internal revenue tax could be imposed as had been done with the currency of state banks; graded excise taxes were proposed to discourage excessive capitalization; the mails were to be denied to monopolistic trusts. The denial to them of a right of appeal to the federal courts was also suggested. National banks and other government fiscal agencies were to be prohibited from receiving on deposit or accepting as collateral any stocks, bonds, or securities of a trust. Patents or copyrights owned by a trust should be forfeited. It was even suggested that the United States government should not deposit government moneys in any bank which in any manner deals with the stocks, bonds, or securities of a trust. Under the Commerce Clause it was proposed that no corporation should engage in interstate commerce without obtaining a federal charter and subjecting all its contracts to the supervision of a government bureau; trust-made commodities were to be forbidden access to the channels of interstate and foreign trade. Indeed, the statute as finally passed provided for confiscation of such commodities while in transit, a remedy so drastic that the government has never but once attempted to invoke it.

Can it be said that these remedies, advocated by leading and responsible leaders of public thought, would have been ineffective as weapons of destruction? Take the denial of postal facilities alone. How could any industrial trust conduct its business if it were denied access to the federal mails over which the federal government has exclusive jurisdiction? It is true that in 1836 the right of Congress to exclude anti-slavery literature from the mails was disputed, but in the later cases of *Ex parte Jackson*<sup>1</sup> and *In re Rapier*<sup>2</sup> the Supreme Court recognized that

"the right to designate what shall be carried [in the mail] necessarily involves the right to determine what shall be excluded."

In a noteworthy speech delivered at Pittsburgh October 14, 1902, the then Attorney-General, Mr. Knox, urged that Congress may

"deny to a corporation whose life it cannot reach the privilege of engaging in interstate commerce except upon such terms as Congress may prescribe to protect that commerce from restraint."

This statement was much quoted and much misunderstood. Mr. Knox, who is a very conservative interpreter of the Constitu-

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<sup>1</sup> 85 U. S. 727.

<sup>2</sup> 143 U. S. 110.



tion, simply meant that Congress could prescribe the terms of participation in interstate commerce when Congress deemed such terms necessary "to protect that commerce [*i. e.* interstate commerce] from restraint."

This statement was accepted by many as an affirmation of the power of Congress to deny the facilities of interstate commerce to any state corporation, except upon such terms as Congress deemed proper, even though such terms had no legitimate relation to interstate commerce or any federal purpose, a view which Mr. Knox vigorously disavowed in the Senate when the Commodities Clause was under discussion. Nevertheless, if the judiciary is powerless to place any limitation upon any federal power by invalidating a clear misuse of such power, was the misinterpretation of Mr. Knox's statement without some sanction from the Supreme Court itself?

The doctrine of nullification by indirection having received judicial sanction, it is not strange that many plans are now openly advocated to have the federal government exercise the police powers of the state by a perversion of its own powers. Of such a plan Senator Beveridge's Child Labor Bill is an instance. Here is a subject beyond question exclusively within the police power of the state. There is not a pretense that Congress has any power to determine the conditions with respect to age under which employment can be had in the states, but it is sought by a federal statute to prevent such child labor by denying to any product that had been manufactured by such labor access to the channels of interstate trade, and, remarkable as the suggestion must seem to old-fashioned lawyers and destructive as it unquestionably is to our dual system of government, it must be admitted that the proposition may be within the doctrine that the judiciary cannot question the purpose and motive of the exercise by Congress of a federal power. It is enough that Congress in its wisdom has concluded that a certain class of commodities should not be carried from state to state or in foreign commerce.

During the discussion of the Child Labor Bill, this doctrine was sought to be reduced to an absurdity by Senator Gallinger, who gravely inquired of Senator Beveridge whether Congress could prohibit the interstate transportation of milk which had been milked by a red-headed girl. Consistency required Senator Beveridge to answer in the affirmative, but he ignored the question. While the Titian-like tresses of the milkmaid can have no legitimate reference to the safety

or welfare of the people in the interstate transportation of milk, yet, on the authority of *Vesey v. Fenno*<sup>1</sup> and *McCray v. The United States*,<sup>2</sup> how could the judiciary review the purpose or motive, however unconstitutional, of Congress in providing that milk, produced in a certain way, should not be carried from state to state?

Perhaps the most remarkable suggestion to nullify the reserved rights of the people by an indirect use of federal power was that made by Mr. Roosevelt on Georgia Day at the Jamestown Exhibition. The President had advocated a bill providing that all employees should receive compensation from employers for any accident suffered in the course of their employment, even though the accident happened without any negligence on the part of the employer and with the grossest neglect on the part of the employee. Except so far as the employers were engaged in interstate traffic, these questions of the relative rights of the employer and employee were peculiarly within the reserved rights of the states, but the President said:

"There should be the plainest and most unequivocal statement by enactment of Congress to the effect that railroad employees are entitled to receive damages for any accident that comes to them as an incident to the performance of their duties, and the law should be such that it will be impossible for the railroads successfully to fight it without thereby forfeiting all right to the protection of the federal government under any circumstances."

Mr. William J. Bryan is, of course, not far behind his illustrious rival in the drastic character of the remedies that he advocates. In his magazine debate with Senator Beveridge several years ago Mr. Bryan says:

"Congress has power to control interstate commerce, and the decision of the Supreme Court in the Lottery Case leaves little doubt that that power can be so exercised as to withdraw interstate railroads and telegraph lines and the mails from the corporations which control enough of the product of any article to give them a virtual monopoly."

Putting together the two remedies, it must be admitted that they are sufficiently drastic, for if one of the prescribed corporations can neither sue in the federal court, transport its freight on interstate railroad lines, telegraph a message, mail a letter, nor enjoy the federal banking facilities, its outlawry would be complete.

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<sup>1</sup> *Supra.*

<sup>2</sup> *Supra.*



The effect upon contemporary politics of this new principle of constitutional jurisprudence is forcefully shown by the new Corporation Tax Law, the main justification of which was that it would enable the federal government to investigate exclusively domestic corporations, which otherwise would be beyond the federal inquisitorial powers.

The logical application of these doctrines would be that in a time of general confiscatory legislation Congress could shut the doors of the federal courts to any railroad which sought to invoke the Fourteenth Amendment if it venture to question the constitutionality of an act of Congress.

The states also have taken up with destructive effect this doctrine. In some, no insurance company can do business unless it first practically waives its right under the federal Constitution to sue in the federal courts, and after some indecision the Supreme Court has sustained this form of nullification by indirection.<sup>1</sup> The logic of this is that any state can compel a foreign corporation not engaged in interstate commerce or some other federal activity to waive all its rights under the federal Constitution if it desires to do business in the state. This results from *Paul v. Virginia*,<sup>2</sup> easily one of the two most mischievous decisions the Supreme Court ever announced.

While this article was in preparation, the Supreme Court indicated for the first time in several decades its purpose to modify the doctrine of *Paul v. Virginia*. *Kansas v. Western Union Telegraph Co.*<sup>3</sup> and the *Pullman Palace Car Co.*<sup>4</sup> decided during the present term of the court, held that if a state imposes, as a condition precedent to the right of a foreign corporation to do business wholly within the state, a condition that is a burden upon the right of this corporation to engage also in interstate commerce, such condition is void. In these cases, the state of Kansas required the two foreign corporations to pay a tax upon their entire capital stock, as a condition of the right to do business wholly within the state of Kansas, and this was adjudged unlawful. Unfortunately, as in so many important cases of recent years, a majority of the court could not join in the same reasoning, for, while five justices united in the judgment, one of them (Mr. Justice White) placed his decision upon narrower grounds. These decisions, however, indicate a significant departure from previous

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<sup>1</sup> See *Prewitt v. Kentucky*, 202 U. S. 246.

<sup>2</sup> 216 U. S. 1.

<sup>3</sup> 8 Wall. 168.

<sup>4</sup> 216 U. S. 56.

decisions and make it probable that in the future a state cannot so exercise its right as to exclude a foreign corporation from engaging in a business which is non-federal in character except upon conditions which burden the rights of such foreign corporation under the federal Constitution. If this be so, why should the federal government be permitted, so far as judicial interference is concerned, to nullify indirectly the reserved rights of the states by the exercise of federal powers?

It may be suggested, however, that this perversion of the taxing power has had familiar illustration from the very beginning of our government in the protective tariff, and that acquiescence in this method of building up one industry and destroying another has been so consistent and is now so universal that it has become a part of our system of government; but this suggestion ignores the undoubted fact that the power to impose protective duties was never based upon the power of taxation, but upon the power to regulate foreign commerce and exclude alien commodities, as to which the power of the federal government is paramount and plenary. This distinction was clearly recognized by the framers of the Constitution. Benjamin Franklin, in the great inquiry at the bar of the House of Commons on February 3, 1766, when asked whether Parliament had no right to lay taxes and duties, replied:

"I never heard any objection to the right of laying duties to regulate commerce, but a right to lay internal taxes was never supposed to be in Parliament as we are not represented there."

The same distinction is found in John Dickinson's Letters from a Farmer, and by William Pitt in his Reply to Grenville. In the memorials addressed to the Crown by the Continental Congress of October 4, 1774, the same distinction was referred to. Prohibitive duties on imports, therefore, come within the sovereign power of the nation to determine what goods shall enter our ports of entry, and if so upon what terms, and this power had been used from time immemorial to foster domestic industries.

The very serious question, however, suggests itself as to whether it is reasonably possible for the judiciary to determine whether a federal power has been exercised for a federal end or for some ulterior purpose. Undoubtedly this task, if ever assumed by the judiciary, would be even more delicate and embarrassing than the ordinary



exercise of the power of adjudging a statute unconstitutional. In many instances it would be beyond the power of the judiciary to determine that a congressional act was not what on its face it purported to be, and it is wholly probable therefore that this nullification by indirection could never be wholly prevented, especially where a taxing statute is used for unconstitutional purposes. Nevertheless, unless our dual system of government is to be subverted the Supreme Court must return to the doctrine of Marshall that,

"should Congress, under the pretext of exercising its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."

To this conclusion, it is the belief of the writer, the court will, indeed must, come. It moves with caution and yet, when the necessity arises, it does not hesitate to recede from a fatally destructive position. Let Senator Beveridge's Child Labor Bill ever come before the court as a statute, and it is believed that that tribunal will modify that which it said in *Vesey v. Fenno* and the other cases cited. It is not only "the living voice of the Constitution," but it is also the conscience of the nation. To the doctrine of judicial impotence will yet come some saving qualification.

Already the Supreme Court makes a distinction between a state statute and a federal statute. As to the former, the Supreme Court has declared repeatedly that it will look beyond the form of the statute, and even its language, and will consider in the light of its history its substantial purpose and its inevitable effect; and even though apart from such purpose and effect the statute be an undoubted exercise of the right of the state legislature, the Supreme Court, disregarding the shadow and looking to the substance, will declare it unconstitutional. Thus, in *Henderson v. The Mayor of New York*,<sup>1</sup> Mr. Justice Miller said:

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

In *Morgan v. Louisiana*<sup>2</sup> the same able justice said:

"In all cases of this kind it has been repeatedly held that when the question is raised whether the state statute is a just exercise of state power

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<sup>1</sup> 92 U. S. 259.

<sup>2</sup> 118 U. S. 455.

or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose."

In *Collins v. New Hampshire*<sup>1</sup> the late Mr. Justice Peckham said:

"The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

In *Mugler v. Kansas*<sup>2</sup> Mr. Justice Harlan said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty — indeed are under the solemn duty — to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

In *Fairbanks v. The United States*<sup>3</sup> Mr. Justice Brewer said:

"In other words, that decision [referring to *Woodruff v. Parham*, 8 Wall. 123], forms the great principle that what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result."

In *Postal Telegraph Co. v. Adams*<sup>4</sup> Chief Justice Fuller said:

"The substance and not the shadow determines the validity of the exercise of power."

In *Smith v. St. Louis Ry. Co.*<sup>5</sup> Mr. Justice McKenna said:

"Any pretense or masquerade will be disregarded and the true purpose of the statute ascertained."

No more clear or vigorous expression could be expected or required. But all these declarations were made with reference to state statutes, which, under the pretense of exercising state powers, had the indirect effect of nullifying a federal power. As, however, an equal

<sup>1</sup> 171 U. S. 30.

<sup>4</sup> 155 U. S. 688.

<sup>2</sup> 123 U. S. 623.

<sup>5</sup> 181 U. S. 248.

<sup>3</sup> 181 U. S. 294.



duty is upon the Supreme Court to adjudge a federal act unconstitutional when it invades the reserved rights of the states, why should not the same judicial scrutiny of the obvious purpose and object of a statute be had in one case as in the other? Is this glaring discrimination either logical or tenable? Whatever it is, it undoubtedly exists.

If the doctrine to which the writer has referred is as pernicious as this argument seeks to establish, how does it then happen that our dual system of government is still preserved? The answer to this is twofold. As long as this government was one of widely scattered communities, between whom intercommunication was slight and unimportant, there could be little real danger of this indirect use of federal powers, but the railroad and the telegraph have united the American people unto a unity of life, of which the fathers of the Republic could never have had even the faintest conception. To-day our dual system of government attempts that which to the writer is an impossible task of dividing essentially an indivisible thing, for commerce, with the ever tightening bands of the railroad and the telegraph, is to-day so unified that the distinction which formerly prevailed with reason between interstate and domestic commerce is no longer practical for many purposes. This has given an overshadowing importance to federal powers, such as taxation, banking, the regulation of commerce, the disbursement of the public funds, and the administration of justice in the federal courts. The danger which formerly was slight and unappreciable, has therefore become an imminent peril. Until comparatively recent years there was a sleepless jealousy of the central government, and this operated to restrain many perversions of the federal power, but since the mighty contest to preserve the integrity of the Union, and due even more largely to the centripetal influences referred to, the insistence upon the reserved rights of the states has become little more than a political platitude. There is little, if any, real popular sentiment of sufficient strength to protect the states against the encroachment of the federal government. The "appeal to the people," of which Gibson and the Supreme Court spoke in the decisions cited, is valueless to protect the rights of the states from federal encroachment. Men have been trained by imperative economic influences to look to the central government as the real political government, and to the states as little more than subordinate provinces useful for purposes of local police

regulation and nothing more. This tendency seems to be in the very nature of events. It is the work of no especial political party or of any political leader. It can no more be stopped than the ocean could be dammed. The American people think nationally and not locally, as they once thought locally and rarely nationally, and propositions, such as have been instanced, are gravely debated in Congress by responsible leaders of public thought, at which Alexander Hamilton would have stood aghast. Could it be imagined for one moment that Alexander Hamilton would have approved the Child Labor Bill, or the destruction of state currency by the imposition of a prohibitive tax? To him the furthest verge of federal power was the creation of the Bank of the United States, but the destruction of state banks of circulation by a federal taxing statute was beyond his anticipation. Until that possibly inevitable day, when by constitutional amendment full power over all trade and commerce without respect to its domestic or interstate character is vested in the federal government, as it is in all other federated nations, it is none the less the solemn duty of both state and nation to respect the limitations upon the powers of each as provided by the Constitution. This may not be possible, unless the Supreme Court recedes from its extreme doctrine of impotence with respect to unquestioned perversions of federal power and adopts towards them the same attitude as it now does towards state statutes of avoiding every law whose purpose and inevitable effect is to encroach upon rights not delegated to the federal government.

To quote the solemn warning of the present venerable Chief Justice in his dissenting opinion in the Lottery Cases:<sup>1</sup>

"Our form of government may remain notwithstanding legislation or decision, but as long ago observed it is with governments as with religions the form may survive the substance of the faith."

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<sup>1</sup> *Supra.*



## STATE AND FEDERAL CONTROL OF CORPORATIONS.

IT would seem that the precise line of demarcation between the power of Congress and that of the states to control corporations engaged in commerce or transportation, remains to be clearly defined by the courts. The power of Congress in this respect, even if not exclusively derived from the commerce clause,<sup>1</sup> may, for present purposes, be conveniently so regarded.

### I. POWER OF CONGRESS OVER FEDERAL CORPORATIONS.

On principle, it may not be easy to accept the view that the mere power to regulate commerce or transportation includes the power to create a corporation for the purpose of engaging therein. Nevertheless, as a matter of authority, it must be regarded as established that Congress has such power. A notable instance of its exercise was the authorization of the construction and maintenance of the Pacific railroads.<sup>2</sup> By the same rule Congress may, instead of itself creating a corporation, confer powers upon a corporation created by a state.<sup>3</sup>

Generally speaking, Congress doubtless has complete power of control over a corporation of its own creation, so far as concerns what is strictly commerce or transportation within the scope of the commerce clause, that is, interstate and foreign commerce generally.<sup>4</sup> It is equally true, however, that this power of Congress is subject to limitations imposed by other provisions of the Constitution, notably by the Fifth Amendment.

It may not be clear that a corporation created by the federal government has power to engage at all in commerce or transportation

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<sup>1</sup> Compare, as to effect of power "to establish post-offices and post-roads," *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1 (1877).

<sup>2</sup> *California v. Central Pacific R. R. Co.*, 127 U. S. 1 (1888); *Roberts v. Northern Pacific R. R. Co.*, 158 U. S. 1, 21 (1895).

<sup>3</sup> *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 657 (1890).

<sup>4</sup> As to regulation of rates for transportation, see *Atlantic & P. R. Co. v. U. S.*, 76 Fed. 186, 192 (D. C. Cal., 1896).

purely intrastate, save as a matter of comity. But, however that may be, has Congress power of control over such corporations, so far as concerns such intrastate commerce or transportation? It has indeed recently been contended with some plausibility that "Congress has the constitutional power to regulate interstate railroads, not only with respect to their interstate business, but with respect to their intrastate business as well, and thus to bring such railroads wholly and exclusively under the regulation of the national government."<sup>1</sup> But this view seems hardly in accord with the doctrine stated in *Gibbons v. Ogden*<sup>2</sup> and applied in the *Employers' Liability Cases*,<sup>3</sup> that the power of Congress does not extend to "that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states." The conclusion that such power is not in Congress involves the further conclusion that it is in the states. If, however, Congress has such power, it is submitted that the power exists merely by way of incident to the power to regulate what is strictly commerce or transportation within the scope of the commerce clause.

For the reasons just stated, it likewise seems beyond the power of Congress to exercise as to a corporation of its own creation, what are sometimes referred to as the "police powers," reserved to the states, and exercised generally, not for the benefit of travelers or shippers, but for the benefit of "the public." Thus, for example, it is doubted that Congress has the power to regulate the speed of interstate trains while within a state. Here again the conclusion that such power is not in Congress involves the further conclusion that it is in the states.<sup>4</sup>

There seems no reason to doubt that it is within the power of Congress to create a corporation for the purpose, not, indeed, of engaging in commerce or transportation as a carrier, but of trans-

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<sup>1</sup> D. W. Fairleigh in 9 *Columbia Law Rev.* 38. The reasoning herein seems largely available in support of the proposition that the states have power to regulate interstate railroads (at any rate, those of their own creation) with respect not only to their intrastate business, but to their interstate business as well. This latter proposition may be acceptable on principle, but, as we shall presently see, the contrary view is established.

<sup>2</sup> 9 *Wheat.* 1, 194 (1824).

<sup>3</sup> 207 *U. S.* 463, 493 (1908).

<sup>4</sup> This point is involved in the question of the validity of the Federal Employers' Liability Act.



porting as a shipper through the agency of carriers. This would probably include the power to sell merely by way of incident to such commerce or transportation, but it seems clear that such corporation would derive from Congress no power to engage in manufacturing or selling wholly within a state. It might, however, possess such power as a matter of comity. As to such internal transactions, though created by Congress, it would not be subject to regulation by Congress, unless by way of incident to commerce or transportation within the scope of the commerce clause. Indeed, it is hard to see how even such power of regulation would exist.

## II. POWER OF THE STATES OVER FEDERAL CORPORATIONS.

Turning now to a consideration of the power of the states to control a corporation created by Congress for the purpose of engaging in commerce or transportation within the scope of the commerce clause, it seems evident that a state can assert no power of control in regard to commerce or transportation strictly within the commerce clause. Thus a state has no power to regulate rates to be charged on interstate or foreign commerce or transportation.<sup>1</sup>

Whether the power of a federal corporation to engage in purely intrastate commerce or transportation be derived from Congress, or from the states, as a matter of comity, it is submitted that as to such commerce or transportation the power of control is in the states and not in Congress.<sup>2</sup> Thus the power to regulate rates on intrastate traffic rests entirely with the states. In *Reagan v. Mercantile Trust Co.*<sup>3</sup> such power of a state was sustained, the corporation being said

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<sup>1</sup> Being without such power even as to a corporation of its own creation, *a fortiori* it is without it as to a corporation created by Congress.

<sup>2</sup> Just as it is beyond the power of a state to control even a corporation of its own creation, as to commerce or transportation within the scope of the commerce clause.

<sup>3</sup> 154 U. S. 413 (1894). But whether it is within the power of Congress to remove a federal corporation from state control, seems to have been here left open, for it was said: "Conceding to Congress the power to remove the corporation in all its operations from the control of the state, there is in the act creating this company nothing which indicates an intent on the part of Congress so to remove it." See also *Smyth v. Ames*, 169 U. S. 466, 522 (1898), which also seems indecisive of the point. In *State v. Texas & Pac. Ry. Co.*, 100 Tex. 279 (1907), however, the court denied, as to such a corporation, the power of the state "to tax the occupation of doing a railroad business wholly within the state." The statement in *Reagan v. Mercantile Trust Co.* quoted in the text was said "to have reference, in the matter of taxation, to the rulings already made by that court, distinguishing between taxation of the property of such

to be "as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

So too, for the reasons already stated, it seems within the power of the states to exercise, over a corporation created by Congress, those "police powers" that are for the benefit of "the public," as distinguished from travelers or shippers.

A corporation created by Congress for the purpose of transportation within the scope of the commerce clause, as a shipper, through the agency of carriers, clearly seems beyond the power of direct regulation by the states, so far as concerns such commerce. Thus a state could not exact a license fee as a condition of engaging therein. On the other hand a federal corporation does seem subject to such regulation as to commerce that is strictly internal.

### III. POWER OF CONGRESS OVER STATE CORPORATIONS.

It has just been seen to be established that Congress has power to create a corporation for the purpose of engaging in commerce or transportation within the scope of the commerce clause. And nothing is better established than that the power of Congress under the commerce clause is exclusive of any exercise of such power under authority of a state, even in the absence of legislation by Congress. In *Asbell v. Kansas*<sup>1</sup> it was said:

"The governmental power over the commerce which is interstate is vested exclusively in the Congress by the commerce clause of the Constitution, and therefore is withdrawn from the states."

The alleged distinction between matters "national" and matters "of local interest"<sup>2</sup> has not been overlooked, though, for reasons which cannot here be elaborated, *Asbell v. Kansas* seems to the writer to go far toward justifying the conclusion that this alleged distinction has finally been repudiated by the Supreme Court. But, whatever

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agencies and taxation of 'the right of the company to exist and perform the functions for which it was brought into being.'" In *Western Union Tel. Co. v. State*, 121 S. W. 194, 201 (Tex. Civ. App., 1909), *State v. Texas & Pac. Ry. Co.* was distinguished as a case of a statute "creating and conferring a corporate franchise to engage in local or domestic business," instead of merely conferring privileges upon a corporation created by a state.

<sup>1</sup> 209 U. S. 251 (1908).

<sup>2</sup> See *Brown v. Houston*, 114 U. S. 622, 630 (1885).



be the merits of such distinction, it is difficult to see how the creation of a corporation to conduct a transcontinental railroad is a matter merely "of local interest."

In this view it would seem to follow that it is beyond the power of the states to create a corporation for the purpose of engaging in commerce or transportation within the scope of the commerce clause. Yet, as a matter of authority, nothing is better established than that a state has such power. The extensive business of interstate transportation by railroad, as well as that of transmission of telegraphic messages, has been conducted rather by corporations created by the states than by those created by Congress. That such power lies in the states seems to have become established with little or no consideration of any objection furnished by the commerce clause. In *Railroad Co. v. Harris*,<sup>1</sup> for instance, this doctrine was applied to the Baltimore & Ohio Railroad Company, originally incorporated in Maryland, and operating extensively through several states. With reference to the power to operate in Virginia, the court said that in what the railway did in that state "the same principle is involved as in the transactions" under consideration in the well-known decision in *Bank of Augusta v. Earle*,<sup>2</sup> it seemingly never having occurred to any one concerned in the case that the effect of the commerce clause was involved.

As with a corporation created by itself, Congress unquestionably has complete control of a corporation created by a state, so far as concerns what is strictly commerce or transportation within the scope of the commerce clause.<sup>3</sup> But, as has already been said, this power of Congress is subject to limitations imposed by other provisions of the Constitution, notably the Fifth Amendment, forbidding the federal government to deprive of "life, liberty, or property, without due process of law." In *Adair v. U. S.*<sup>4</sup> it was said:

"The power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution."

Does, then, Congress have the power absolutely to prohibit transportation by a corporation created by a state? Although regulation,

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<sup>1</sup> 12 Wall. 65, 81 (1870).

<sup>2</sup> 13 Peters 519 (1839).

<sup>3</sup> *Northern Securities Co. v. U. S.*, 193 U. S. 197, 345 (1904).

<sup>4</sup> 208 U. S. 161, 180 (1908).

in its ordinary sense, does not seem to include prohibition, it may be conceded that, as was said in *Northern Securities Co. v. U. S.*<sup>1</sup>

"In some circumstances regulation may properly take the form and have the effect of prohibition."

Doubtless "liberty," within the meaning of the Fifth Amendment, does not include liberty to commit an act essentially criminal, such as theft or murder, or any other act contrary to public policy, as, for example, the maintenance of a lottery, or acts in contravention of the rule of free competition. Hence Congress has power to prohibit a corporation created by a state from engaging in commerce or transportation within the scope of the commerce clause, in so far as engaging therein involves the commission of such acts. Thus in *Champion v. Ames*<sup>2</sup> the court sustained, as applicable to an express company, an act of Congress prohibiting as a criminal offense the carriage of lottery tickets from state to state. So too, in *U. S. v. Trans-Missouri Freight Assoc.*,<sup>3</sup> *U. S. v. Joint Traffic Assoc.*,<sup>4</sup> *Northern Securities Co. v. U. S.*,<sup>5</sup> the federal anti-trust act, enacted by way of giving effect to "the rule of free competition," was sustained as applicable to transportation by railroad corporations created by the states.

But all this is obviously very different from an absolute prohibition of transportation generally, which, in this view, is beyond the power of Congress, so far, at least, as the commerce clause is concerned.<sup>6</sup> If such result be attainable at all, it must be by resort to some other provision of the Federal Constitution, as, for example, those sections conferring the power to tax.<sup>7</sup> Yet even this seems doubtful.

The same line of reasoning is applicable to a corporation created by a state, and including among its powers that of engaging in transportation within the scope of the commerce clause as a shipper,

<sup>1</sup> 193 U. S. 197, 335 (1904).

<sup>2</sup> 188 U. S. 321, 356 (1903).

<sup>3</sup> 166 U. S. 290 (1897).

<sup>4</sup> 171 U. S. 505 (1898).

<sup>5</sup> 193 U. S. 197, 335 (1904).

<sup>6</sup> See *Champion v. Ames*, 188 U. S. 321, 362 (1903).

<sup>7</sup> A suggestion of the existence of such power has sometimes been thought to be furnished by *Veazie Bank v. Fenno*, 8 Wall. 533 (1869), sustaining the imposition of a tax on the notes of state banks. See *Hendrick, The Power to Regulate Corporations and Commerce*, § 115. See also an article by H. L. Wilgus in 2 Mich. Law Rev. 358, 384 (1904).



through the agency of carriers. That is to say, subject to the limitations just considered, it is beyond the power of Congress absolutely to prohibit such transportation, or to require the performance of a condition, such as the payment of a license fee, before engaging therein.<sup>1</sup>

So too, for the reasons already considered, neither of these classes of corporations seems subject to regulation by Congress as to purely internal commerce, or to the exercise by Congress of the "police powers" reserved to the states.

#### IV. POWER OF THE STATES OVER STATE CORPORATIONS, DOMESTIC AND FOREIGN.

It would seem that it might reasonably be contended that every corporation is subject to the control of the state which created it. In this view, the powers reserved to the states include such power of control, even as to what is strictly commerce or transportation within the scope of the commerce clause. It has pertinently been said:

"Certainly a state cannot be compelled to create corporations in aid of, or to facilitate commerce between the states; but if it does create one capable of engaging in such commerce, and the corporation in fact so engages, is that an emancipation of the corporation from the control of the state?"<sup>2</sup>

But the contrary view seems well established. Thus, in *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*,<sup>3</sup> it was as to a domestic railroad corporation that there was held invalid the regulation of rates for transportation within the scope of the commerce clause. And in *Philadelphia & Southern Steamship Co. v. Pennsylvania*<sup>4</sup> taxation of gross receipts of a domestic corporation was likewise held invalid.

What seems to be so anomalous a doctrine crept in without much observation or preliminary discussion. Probably this was the result

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<sup>1</sup> A contrary view has been conspicuously advocated. See, in 3 Mich. Law Rev. 264 (1905), a discussion by H. L. Wilgus of the recommendation of Mr. Garfield as Commissioner of Corporations.

<sup>2</sup> *State v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St. 130 (1890). See also the very forcible dissenting opinion in *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557 (1886).

<sup>3</sup> *Supra*.

<sup>4</sup> 122 U. S. 326 (1887).

of failure to observe the distinction between the right to engage in commerce or transportation as an individual, and such right as a corporation. These rights are essentially different in character. In *Hoxie v. N. Y., N. H. & H. R. R. Co.*<sup>1</sup> it was said by Baldwin, J.:

"The right to engage in commerce between the states is not a right created by or under the Constitution of the United States. It existed long before that Constitution was adopted."

But surely this language has no application to the right so to engage in commerce as a corporation. As was said above, "a state cannot be compelled to create corporations in aid of or to facilitate commerce between the states." Nor can it be compelled to continue such corporations in existence. How then can a state be compelled to allow a corporation of its creation, while in existence, to engage in commerce or transportation within the scope of the commerce clause?

The same reasoning is substantially applicable to foreign corporations. Generally speaking, a state has undoubted power to impose restrictions, even to the extent of prohibition, upon the transaction by foreign corporations of business within its limits. It is submitted that on principle such reserved power includes the imposition of restrictions upon transportation within the scope of the commerce clause. But the settled rule is otherwise.

Nevertheless the states have as to both domestic and foreign corporations general power of control over purely internal commerce, in addition to the exercise of their "police powers" for the benefit of the public. This point, which has such numerous illustrations, need not here be dwelt upon.

## V. COMPARATIVE ADVANTAGES OF STATE AND FEDERAL INCORPORATION.

Of late there has been no little discussion whether there is any advantage in the creation of corporations under the authority of Congress.<sup>2</sup> As already noted, there are several instances of such creation for the purpose of engaging in commerce or transportation as carriers. So far as concerns the application of the commerce clause, the writer is not aware that such a corporation enjoys any

<sup>1</sup> 73 Atl. 754, 759 (Conn., 1909). See authorities cited in this well-considered opinion.

<sup>2</sup> What is here said has no reference to the power of Congress over the District of Columbia and the territories.



substantial advantage, or is, for that matter, subject to any substantial disadvantage, as compared with corporations created by the states. There has been little or no utilization of such power of Congress to create a corporation for the purpose of transporting as a shipper through the agency of carriers. The exercise of power for that purpose was recently advocated by the learned Attorney-General, who says:

"Such corporations formed under national law would not be foreign corporations in any of the states, and would therefore be at liberty to transact their business without state permission and free from state interference. . . . If, now, Congress shall enact a law providing for national incorporation to carry on interstate commerce, subject to such restrictions and with such freedom from local state control as Congress shall see fit to prescribe, the state control of foreign corporations, in all probability, will soon cease to be a subject of great importance."<sup>1</sup>

But if the views already stated are correct, this conclusion seems insufficiently justified. So far as concerns commerce or transportation within the scope of the commerce clause, even corporations created by the states are "at liberty to transact their business without state permission and free from state interference." On the other hand, it remains to be established that a corporation created by Congress, at any rate one created to engage in transportation merely as a shipper, is not, to use the language of *Reagan v. Mercantile Trust Co.*, "as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

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<sup>1</sup> G. W. Wickersham in 19 Yale Law Jour. 1. See also an article by H. L. Wilgus in 2 Mich. Law Rev. 358.

# HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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THE POLICE POWER OF THE STATES AND THE FEDERAL POWER OF TAXATION. — Although the federal government cannot interfere with the internal police regulations of the states,<sup>1</sup> the states, on their part, must not in the exercise of their exclusive police powers obstruct the constitutional powers of the national government.<sup>2</sup> However, the line between these powers and the police powers reserved to the states under the Constitution, cannot be clearly defined. While, as a general rule, direct regulation of foreign and interstate commerce by the states has been held invalid,<sup>3</sup> incidental and reasonable restrictions, such as health laws and the like, have been sustained.<sup>4</sup> In the matter of patent rights, also, a similar distinction between direct<sup>5</sup> and incidental<sup>6</sup> burdens has been followed. Unlike the jurisdiction of Congress over patents and foreign and interstate commerce, which is potentially, if not actually exclusive,<sup>7</sup> the federal power of taxation is concurrent

<sup>1</sup> U. S. v. Dewitt, 9 Wall. (U. S.) 41; Barbier v. Connolly, 113 U. S. 27, 31.

<sup>2</sup> Gibbons v. Ogden, 9 Wheat. (U. S.) 1; Henderson v. Mayor of New York, 92 U. S. 259.

<sup>3</sup> Railroad Co. v. Husen, 95 U. S. 465; Hall v. DeCuir, 95 U. S. 485. See 1 HARV. L. REV. 159; 4 *ibid.* 221; 10 *ibid.* 378.

<sup>4</sup> Morgan's S. S. Co. v. La. Board of Health, 118 U. S. 455; Mo., Kans., & Texas Ry. Co. v. Haber, 169 U. S. 613; Smith v. Alabama, 124 U. S. 465. See 2 HARV. L. REV. 267, 293; 11 *ibid.* 544; 22 *ibid.* 437.

<sup>5</sup> *In re Sheffield*, 64 Fed. 833; People v. Board of Assessors, 156 N. Y. 417. See 12 HARV. L. REV. 353. The same is true as to copyrights. People v. Roberts, 159 N. Y. 70.

<sup>6</sup> Allen v. Riley, 203 U. S. 347; Reeves v. Corning, 51 Fed. 774. See 20 HARV. L. REV. 333. State regulation of the use of the articles patented has uniformly been upheld. Webber v. Virginia, 103 U. S. 344.

<sup>7</sup> Where the subject of commerce is national in character or requires uniformity throughout the United States the power of Congress is actually exclusive. Cooley v. The Board of Wardens, 12 How. (U. S.) 299; Robbins v. Shelby County Taxing Dis-



with a similar power in the states.<sup>8</sup> Neither sovereignty, however, can tax the instrumentalities employed by the other in carrying into execution its constitutional powers.<sup>9</sup> Thus a state must not directly impede the collection of federal taxes.<sup>10</sup> But on the other hand, the federal government cannot by taxation interfere with the means used in a lawful exercise of the state police power.<sup>11</sup>

Concurrent regulation of the liquor traffic — on the part of the United States by an internal revenue license law which is in effect a tax, and on the part of the states by licenses and other police regulations — has brought these two jurisdictions into conflict. By an unbroken line of decisions the federal license gives no authority to carry on the liquor trade in the state, but is a mere receipt for a tax.<sup>12</sup> The regulation of the internal liquor traffic continues to be a matter exclusively within the police power of the states; and the most arbitrary and even confiscatory statutes have been upheld.<sup>13</sup> To aid in the better enforcement of local liquor laws, the states have attempted to utilize the evidence furnished by the federal license system. Thus it is uniformly held in the state courts that the payment of the federal tax and possession of the receipt therefor is *prima facie* evidence of a violation of the state prohibitory law.<sup>14</sup> But the constitutionality of numerous statutes to this effect has not yet been tested.<sup>15</sup> Moreover, it has been held that a state court cannot compel the production by the federal collector of the United States records of returns and license payments.<sup>16</sup>

A statute in North Dakota provides that every person to whom a federal license is issued must publish notices of the same for three weeks in the newspapers, and after such period keep posted, along with the government tax receipt,<sup>17</sup> an affidavit of the fact of the publication and the obtaining of such license; and further, a duly authenticated copy of the tax receipt is required to be filed with a certain state officer, whose duty it is to publish monthly lists of such licenses. This statute has recently been held by the Supreme Court unconstitutional as an unreasonable burden on the federal power of taxation. *State of North Dakota v. Hanson*, 30 Sup. Ct. 179.

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strict, 120 U. S. 489. But otherwise it is merely potentially exclusive until Congress acts. *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Nashville, etc. Ry. v. Alabama*, 128 U. S. 96.

<sup>8</sup> *Lane County v. Oregon*, 7 Wall. (U. S.) 71, 77. See *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 108.

<sup>9</sup> *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316; *The Collector v. Day*, 11 Wall. (U. S.) 113. See 19 HARV. L. REV. 286.

<sup>10</sup> *U. S. v. Snyder*, 149 U. S. 210; *Palfrey v. City of Boston*, 101 Mass. 329.

<sup>11</sup> *Ambrosini v. U. S.*, 187 U. S. 1; *U. S. v. Owens*, 100 Fed. 70.

<sup>12</sup> *License Tax Cases*, 5 Wall. (U. S.) 462; *Pervear v. The Common*, 5 Wall. (U. S.) 475. A provision to this effect has now been incorporated in the internal revenue statute. U. S. Comp. Stat. (1901) § 3243.

<sup>13</sup> *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1.

<sup>14</sup> *State v. Teahan*, 50 Conn. 92; *Frude v. State*, 66 Neb. 244. The fact of payment may be proved by the original records of the United States revenue collector (*State v. Intoxicating Liquors*, 44 Vt. 208; *State v. Gorham*, 65 Me. 270); or by a certified copy of these records (*State v. White*, 70 Vt. 225; *State v. Howard*, 91 Me. 396), or by other evidence (*Common v. Brown*, 124 Mass. 318).

<sup>15</sup> *Common v. Uhrig*, 146 Mass. 132; *Guy v. State*, 96 Md. 692.

<sup>16</sup> *In re Weeks*, 82 Fed. 729; *In re Huttman*, 70 Fed. 699. *Contra, In re Hirsch*, 74 Fed. 928.

<sup>17</sup> The United States statute requires all persons to keep posted the receipts denoting payment of the tax. U. S. COMP. STAT. (1901) § 3239.

As in the case of interstate commerce and of patent rights, whether the test applied be that of reasonableness or that of directness, the question is largely one of degree. A state statute requiring persons selling oleomargarine under a similar federal license to display signs to that effect on their wagons has been upheld.<sup>18</sup> On the other hand it has been held that liens securing payment of the United States internal revenue tax are not subject to state recording acts.<sup>19</sup> The statute in the present case imposes a burden on the person who pays the federal tax solely because of the payment of such tax and the posting of the license as required by the United States statute, irrespective of any user of such license within the jurisdiction. Hence there are no acts upon which the police power can rightfully operate, as was true in the oleomargarine case. On the contrary, the present statute is more closely analogous to the question involved in the lien case, since it is in form and substance a direct burden on the collection of federal taxes. Therefore, as an interference with the means employed by the national government in the exercise of its lawful power of taxation, it was rightly held unconstitutional.

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ORIGINAL PROBATE OF FOREIGN WILLS. — Normally a will should be presented for primary probate at the testator's last domicile<sup>1</sup> regardless where it was executed or where the death occurred.<sup>2</sup> And at that place it is ordinarily the duty of the executor to offer the will for probate.<sup>3</sup> Reasons of convenience of proof, coupled with the fact that the settlement of the estate as well as the construction<sup>4</sup> and validity<sup>5</sup> of the will (except as to foreign realty)<sup>6</sup> are governed by the law of the domicile, make this practice desirable. Then, if necessary, ancillary probate or administration will be granted by those states and countries in which the deceased has left property.<sup>7</sup> It is not strictly necessary, however, that this order be followed. Since every sovereign has plenary power with respect to the administration of the estates of deceased persons situated within the jurisdiction, any

<sup>18</sup> *Common v. Crane*, 158 Mass. 218. A state may, under its police power, tax oleomargarine selling, though it is licensed by the federal government. *Plumley v. Massachusetts*, 155 U. S. 461.

<sup>19</sup> *U. S. v. Snyder*, *supra*.

<sup>1</sup> *Mills v. Fogal*, 4 Edw. Ch. (N. Y.) 559. See *Stark v. Parker*, 56 N. H. 481, 487. Similarly, in case of intestacy the primary administration is at the domicile. *Stevens v. Gaylord*, 11 Mass. 255, 262.

<sup>2</sup> *Converse v. Starr*, 23 Oh. St. 491.

<sup>3</sup> *Mills v. Fogal*, *supra*; *Scripps v. Wayne Probate Judge*, 131 Mich. 265.

<sup>4</sup> *Harrison v. Nixon*, 9 Pet. (U. S.) 483, 504 (personalty); *Guerard v. Guerard*, 73 Ga. 506 (realty); STORY, CONFLICTS, 8 ed., § 479 (a) (h). But if a change of domicile occurs, then the law of the domicile at the time the will was made governs. *Atkinson v. Staigg*, 13 R. I. 725; *Staigg v. Atkinson*, 144 Mass. 564.

<sup>5</sup> *Moultrie v. Hunt*, 23 N. Y. 394; STORY, CONFLICTS, 8 ed., §§ 465-473, 481. For statutes making probate in the domicile conclusive as to personality, see 1 WOERNER, LAW OF ADMINISTRATION, 2 ed., 493.

<sup>6</sup> *Robertson v. Pickrell*, 109 U. S. 608; STORY, CONFLICTS, 8 ed., §§ 474, 483. As to realty, statutes in but few states make probate in the domicile conclusive. 1 WOERNER, LAW OF ADMINISTRATION, 2 ed., 494.

<sup>7</sup> For list of state statutes providing for ancillary probate or administration, see 1 WOERNER, LAW OF ADMINISTRATION, 2 ed., 493. Ancillary probate will be allowed even though the court in a prior original proceeding held the will invalid. *Willett's Appeal*, 50 Conn. 330; *Succession of Gaines*, 45 La. Ann. 1237.



state where property of the deceased is found may grant original probate, though the will has never been probated at the testator's domicile;<sup>8</sup> but this probate will be conclusive only as to property within the jurisdiction.<sup>9</sup> And such proceedings are merely ancillary in character.<sup>10</sup> Moreover, the courts of the domicile, to preserve their primary jurisdiction, will refuse recognition to foreign administration of this nature and require presentation of the original will for probate,<sup>11</sup> even under broad statutes commonly in force whereby "all wills duly proved in any other state or country" may be recorded on production of authenticated copies of the will and foreign probate.<sup>12</sup> Thus a departure from the normal method may frequently lead to great confusion.<sup>13</sup>

Whether a court will so admit a foreign will to probate before it has been probated at the domicile of the testator is a question of discretion rather than of power.<sup>14</sup> To this effect is a recent decision, although on the facts presented jurisdiction was declined. *Rackemann v. Taylor*, 90 N. E. 552 (Mass.). Notwithstanding practical convenience and principles of comity favor refusal of probate in such a situation, there may nevertheless be circumstances which in the opinion of the court will justify a departure from the customary procedure. Thus where it is plainly for the accommodation of all parties concerned, and all assent, the court should not arbitrarily decline to take jurisdiction. And when the executor or other party withholds the will from the proper court, original administration for the protection of local creditors is rightly granted by any state having property within its control.<sup>15</sup> Again, objections on grounds of comity may be minimized so as to justify an original foreign probate; as, for example, where the whole or the bulk of the property consists of foreign realty, which is always governed by the law of the *situs*.<sup>16</sup> Finally, when once probate has been granted without objection, mere reasons of policy will be no sufficient ground for its annulment.<sup>17</sup> In a late case a testator died domiciled in England and left two separate and independent wills, one disposing of his entire English property and the other of his property, real and personal, situated in Kansas. The English will alone was probated in England, while the American will was brought to Kansas and there admitted to probate. *Thompson v. Parnell*, 105 Pac. 502 (Kans.). These facts offered an excellent opportunity for the exercise of the court's

<sup>8</sup> *Pepper's Estate*, 148 Pa. St. 5 (realty); *In re Gordon*, 50 N. J. Eq. 397 (personalty). This power is frequently declared by statute. *In re Clayson's Estate*, 26 Wash. 253; *Jaques v. Horton*, 76 Ala. 238.

<sup>9</sup> *Walton v. Hall's Estate*, 66 Vt. 455 (realty). On principles of comity the law of the domicile will usually be followed as to personality. *Wells v. Wells*, 35 Miss. 638, and authorities cited under note 5, *supra*. But a contrary rule is sometimes adopted by statute. *Newcomb v. Newcomb*, 108 Ky. 582.

<sup>10</sup> *Prescott v. Durfee*, 131 Mass. 477; *Stevens v. Gaylord*, *supra*.

<sup>11</sup> *Scripps v. Wayne Probate Judge*, *supra*; *Wallace v. Wallace*, 3 N. J. Eq. 616. Where the original is detained by the foreign court, proof by means of commissioners is allowed. *McDonald's Estate*, 130 Pa. St. 480. Cf. *Loring v. Oakey*, 98 Mass. 267.

<sup>12</sup> *In re Clark's Estate*, 148 Cal. 108; *Bate v. Incisa*, 59 Miss. 513; *Tarbell v. Walton*, 71 Vt. 406.

<sup>13</sup> For example, see two cases on the same will: *Matter of Cameron*, 47 N. Y. App. Div. 120, and *Davis v. Upson*, 230 Ill. 327.

<sup>14</sup> Cf. *Putnam v. Pitney*, 45 Minn. 242.

<sup>15</sup> *Bowdoin v. Holland*, 10 Cush. (Mass.) 17.

<sup>16</sup> *Varner v. Bevil*, 17 Ala. 286; *Pepper's Estate*, *supra*.

<sup>17</sup> *Hyman v. Gaskins*, 27 N. C. 267.

discretion in favor of taking jurisdiction. Since it is held in England that in case of two such separate wills the foreign will is not entitled to English probate,<sup>18</sup> admission to probate at the *situs* of the property was not only the most convenient solution but also violated no principles of comity.

JURISDICTION OF EQUITY TO RESTRAIN CRIMINAL PROCEEDINGS. — In early times when the common-law courts, because of the corruption and lawlessness of the period, were unable to give adequate relief, equity took jurisdiction of many criminal matters.<sup>1</sup> But this extended jurisdiction became obsolete as the need for it disappeared.<sup>2</sup> And in modern times, it has been broadly stated that equity has no power to enjoin criminal proceedings, nor to restrain the enforcement of statutes or ordinances.<sup>3</sup> It is, of course, true that equity cannot by its decree bind the criminal courts or the sovereign.<sup>4</sup> But it is no more impossible to restrain private prosecutors from initiating criminal proceedings than to prevent them from starting civil suits.<sup>5</sup> Nor does there seem to be any jurisdictional objection to the enjoining of public prosecutors who are acting under an invalid statute,<sup>6</sup> or an incorrect interpretation of a valid statute, or even a misapprehension of fact. Such an injunction is not aimed at the state itself.<sup>7</sup> The real question, then, in these cases is not whether equity can, but whether it should, restrain criminal prosecutions; that is, the question is one of power but of policy.<sup>8</sup>

It may be conceded that as a general rule equity should not so interfere.<sup>9</sup> Furthermore, it is obvious that equity should not enjoin a criminal proceeding where it would not enjoin a civil suit. And many cases apparently denying altogether the jurisdiction of equity to interfere with criminal proceedings may be distinguished on this ground, since the facts raise no question of irreparable damage or of inadequacy of remedy at law.<sup>10</sup> Where, however, the plaintiff's legal remedy is clearly inadequate, equity can and should enjoin criminal proceedings, unless the objections of public policy appear too strong. The nature of the wrong sought to be redressed is material on this question of policy. Courts are, therefore, more ready to enjoin prosecutions *ex relatione*, or under municipal ordinances, than proceedings for other violations of the law.<sup>11</sup>

<sup>18</sup> In the Goods of Coode, 1 Prob. & Div. 449; In the Goods of Murray, [1896] Prob. 65.

<sup>1</sup> 1 SPENCE, EQ. JUR. 341, 685.

<sup>2</sup> See *In re Sawyer*, 124 U. S. 200, 210.

<sup>3</sup> The Old Dominion Telegraph Co. v. Powers, 140 Ala. 220; *Suess v. Noble*, 31 Fed. 855. See *Mayor of York v. Pilkington*, 2 Atk. 302; *Holderstaffe v. Saunders*, 6 Mod. 16.

<sup>4</sup> *Suess v. Noble*, *supra*. See *Ex parte Young*, 209 U. S. 123, 163.

<sup>5</sup> *Hendy v. Owen*, Moore 820; *Mayor of York v. Pilkington*, *supra*.

<sup>6</sup> *Ex parte Young*, *supra*.

<sup>7</sup> *Ex parte Young*, *supra*. Cf. *Fitts v. McGhee*, 172 U. S. 516.

<sup>8</sup> See *Hemsley v. Myers*, 45 Fed. 283, 288; *Ex parte Young*, *supra*, 166. Cf. Lord Hardwicke's language in *Lord Montague v. Dudman*, 2 Ves. Sr. 396.

<sup>9</sup> See *In re Sawyer*, 124 U. S. 200, 210; 19 HARV. L. REV. 382.

<sup>10</sup> See, e. g., *Kerr v. Corporation of Preston*, 6 Ch. D. 463; *Minneapolis, etc. Co. v. McGillivray*, 104 Fed. 258.

<sup>11</sup> See 17 HARV. L. REV. 567; *Sylvester Coal Co. v. The City of St. Louis*, 130 Mo. 323, 330.



The existing state of the authorities is quite confused. It is generally agreed that equity may act where a party to an equitable suit seeks to try the self-same issue in a subsequent criminal suit,<sup>12</sup> or tries to interfere by criminal prosecutions with an act ordered by the court.<sup>13</sup> But whether the fact that the criminal proceeding would involve irreparable injury to the plaintiff's property calls for equitable interference is not uniformly decided; though by the better view the jurisdiction is conceded.<sup>14</sup> And the authorities are in even greater conflict where the jurisdiction is sought to be based on the avoidance of multiplicity of suits at law; that is, by a bill of peace. Where there are many defendants at law, and all unite in raising the same issue of law as a defense, it would seem that equity should take jurisdiction.<sup>15</sup> An injunction under such circumstances was, however, refused in a recent case. *J. W. Kelly & Co. v. Conner*, 123 S. W. 622 (Tenn.). Similarly, where a single plaintiff seeks by the bill to avoid multiplicity of suits, all raising the same issue of law, the bill should be allowed.<sup>16</sup> Whether in the latter case the plaintiff need first establish his right at law is not altogether clear on the authorities. The majority of the cases do not enforce this requirement.<sup>17</sup> The minority view would, however, seem applicable where the bill is laid as a pure bill of peace, but there appears to be no multiplicity of suits pending. If the common question is one of fact, it may seem doubtful as a matter of policy whether the bill should be allowed, because of the resulting invasion of the province of the jury in criminal trials.<sup>18</sup>

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**JURISDICTION OF EQUITY TO ENJOIN THE PASSAGE OF A MUNICIPAL ORDINANCE.** — The considerations which lead equity to enjoin the enforcement of municipal ordinances are referred to in the preceding note. Certainly if the enforcement of a particular ordinance could not be restrained, an injunction will not lie against its passage. But the converse of this proposition is not necessarily true. Municipal assemblies have a power of legislation, delegated to them by the legislature, in the exercise of which they should be as immune from judicial interference as is the legislature itself.<sup>1</sup> And as a court may not interfere with the legislature while delib-

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<sup>12</sup> *Mayor of York v. Pilkington*, 2 Atk. 302. *Cf. Hedley v. Bates*, 13 Ch. D. 498. See *Harkrader v. Wadley*, 172 U. S. 148.

<sup>13</sup> *Turner v. Turner*, 15 Jur. 218.

<sup>14</sup> *Dobbins v. City of Los Angeles*, 195 U. S. 223; *Ryan v. Jacob*, 6 Wkly. L. Bul. (Oh.) 139; *Shinkle v. City of Covington*, 83 Ky. 420. See *Grand Junction Waterworks Co. v. Hampton*, etc., [1898] 2 Ch. 331. *Contra, Suess v. Noble*, 31 Fed. 855.

<sup>15</sup> *City of Chicago v. Collins*, 175 Ill. 445. *Cf. Ewelme Hospital v. Andover*, 1 Vern. 266. *Contra, Wade v. Nunnely*, 19 Tex. Civ. App. 256 (no bill unless irreparable damage); *State ex rel. Kenamore v. Wood*, 155 Mo. 425.

<sup>16</sup> *Third Ave. R. R. Co. v. The Mayor*, etc., 54 N. Y. 159; *Block v. Crockett*, 61 W. Va. 421. But see *City of Galveston v. Mistrot*, 47 Tex. Civ. App. 63 (no bill unless irreparable damage); *Predigested Food Co. v. McNeal*, 1 Oh. N. P. 266.

<sup>17</sup> *Third Ave. R. R. Co. v. Mayor*, etc., *supra*. See *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323. *Contra, West v. Mayor*, 10 Paige (N. Y.) 539. See *Lord Tenham v. Herbert*, 2 Atk. 483.

<sup>18</sup> *Arbuckle v. Blackburn*, 113 Fed. 616; *Predigested Food Co. v. McNeal*, *supra*. See *Davis v. American Society*, etc., 75 N. Y. 362; *Davis v. Fasig*, 128 Ind. 271, 276. *Cf. Tribette v. Illinois Central R. R. Co.*, 70 Miss. 182.

<sup>1</sup> *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471.

erating upon the adoption of a law, the general rule is that equity will not enjoin the passage of an ordinance which is legislative in character. *Chicago, Rock Island, & Pacific Ry. Co. v. City of Lincoln*, 124 N. W. 142 (Neb.).

But a municipal corporation also exercises other than legislative functions. And, while the rule above is everywhere recognized, it has frequently been held that it has no application if the ordinance is not legislative in character; in which case its passage may be enjoined.<sup>2</sup> Even cases adopting this distinction as a basis of decision reach conflicting results because of the difficulty of determining whether a particular ordinance is in fact legislative. Thus there have been decisions both ways as to enjoining the passage of an ordinance granting to a public service corporation the privilege of using the streets.<sup>3</sup> And, although there would seem to be no distinction, in this connection, between an ordinance authorizing a contract with a gas company and one authorizing a contract with a water company, yet relief has been refused in the former case<sup>4</sup> but granted in the latter.<sup>5</sup> A different limitation on the general rule is adopted in other cases, which hold that an injunction will issue against the passage of an ordinance which is *ultra vires* the municipal body about to pass it, even though the ordinance is clearly legislative in character.<sup>6</sup> Under such circumstances a few courts have said that relief by injunction may be had as well before as after its passage.<sup>7</sup> Much more frequently, however, it has been held that the relief will not be granted in any case unless the mere passage of the ordinance, as distinguished from its enforcement, would cause irreparable damage.<sup>8</sup> Were this rule followed strictly, it would seem to preclude relief in any case; for an injunction either against the enforcement of the ordinance, or the execution of the contract authorized, or against the exercise of the privilege granted, would, under any circumstances, be a remedy wholly adequate.<sup>9</sup>

This being so, no hardship could result from a general rule that an injunction should never be issued against the passage of an ordinance. And it is believed that such a rule would be a proper limitation on the jurisdiction of equity. Certainly, no convincing reason in favor of a further extension has been suggested in any of the cases. Indeed, the distinctions drawn in the decisions have little merit, on principle, as bearing on the question in hand, and have led only to confusion. Other things being equal, it seems preferable that the members of municipal assemblies be left to exercise their discretion in voting on subjects under discussion without interference by the courts.

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**REMEDIES OF AN ABUTTING LANDOWNER WHOSE PROPERTY IS INJURED BY PUBLIC WORKS.** — Since 1850 the constitutional provision that property shall not be taken for public use without compensation has been construed to apply to the right of an abutting landowner not to have his property de-

<sup>2</sup> *Roberts v. City of Louisville*, 92 Ky. 95.

<sup>3</sup> *State ex rel. Rose v. Superior Court of Milwaukee*, 105 Wis. 651; *Albright v. Fisher*, 164 Mo. 56; *State ex rel. Abel v. Gates*, 190 Mo. 540.

<sup>4</sup> *Montgomery Gas-Light Co. v. City Council of Montgomery*, 87 Ala. 245.

<sup>5</sup> *Poppleton v. Moores*, 62 Neb. 851.

<sup>6</sup> *International Trading-Stamp Co. v. City of Memphis*, 101 Tenn. 181.

<sup>7</sup> See *Spring Valley Water-Works v. Bartlett*, 16 Fed. 615.

<sup>8</sup> *Murphy v. East Portland*, 42 Fed. 308.

<sup>9</sup> See *Whitney v. Mayor, etc. of New York*, 28 Barb. (N. Y.) 233.



preciated in value by smoke, noise, or deprivation of light and air, etc., incident to the running of an elevated or other railroad.<sup>1</sup> The property right of which the owner is deprived is the action of nuisance which he would have, were the railroad in a private business.<sup>2</sup> Assuming the existence of this right, interesting questions arise as to the owner's remedies for its infringement by a public service corporation.

An action at law will lie to recover compensation for realty appropriated to public use without proper condemnation proceedings, on the principle of *quantum meruit*, or by analogy to the action of trover in the case of personal property.<sup>3</sup> Similarly, future damages may be recovered for injury to realty where the damage is permanent.<sup>4</sup> In such cases the true rule of compensation is the depreciation in the value of the land referable to the defendant's tort,<sup>5</sup> although in New York damages are allowed only to the time of the trial.<sup>6</sup> In a few jurisdictions equity has relieved the landowner in rather an unusual manner: an injunction will issue to be operative unless the defendant within a limited time pay the compensation fixed by the court, and upon such payment the plaintiff is required to execute a conveyance of the so-called easements.<sup>7</sup> Such an injunction is expressly denied in Illinois and several other states,<sup>8</sup> to which South Dakota is now to be added. *Hyde v. Minnesota, D. & P. Ry.*, 123 N. W. 849.

An analogy to this equitable remedy is the owner's right, allowed in some cases, to enjoin the use of land appropriated, until compensation is made.<sup>9</sup> But such relief is really no more than a summary means of compelling payment; and the remedy at law seems adequate both in the case where land is actually taken and where it is injured. Only in New York, there-

<sup>1</sup> LEWIS, EMINENT DOMAIN, 3 ed., §§ 63-66 (54-57); *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504; *Story v. N. Y. Elevated Ry.*, 90 N. Y. 122. See *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166, 177. But see *Fries v. N. Y. & H. R. R.*, 169 N. Y. 270. See also 15 HARV. L. REV. 665; 19 *ibid.* 127.

<sup>2</sup> See *Wehn v. Comm's of Gage Co.*, 5 Neb. 494; *Burwell v. Comm's*, 93 N. C. 73; LEWIS, EMINENT DOMAIN, 3 ed., § 65 (56).

<sup>3</sup> *U. S. v. Linah*, 188 U. S. 445. See LEWIS, EMINENT DOMAIN, 3 ed., § 889 (623), note 41 and cases cited.

<sup>4</sup> *City of Centralia v. Wright*, 156 Ill. 561; *Aldis v. Union Elev. R. R.*, 203 Ill. 567; *Harvey v. Mason City R. R.*, 129 Ia. 465; *Chicago, etc. R. R. Co. v. O'Neill*, 58 Neb. 239; *White v. R. R.*, 113 N. C. 610; *Grafton v. B. & O. R. R.*, 21 Fed. 309; *R. R. Co. v. Hambleton*, 40 Oh. St. 496; *O'Brien's Ex. v. Pa. S. V. R. R. Co.*, 119 Pa. St. 184; *Blanchard v. Kansas City*, 5 McCrary (U. S.) 217.

<sup>5</sup> See *Bohm v. Metropolitan Elevated Ry.*, 129 N. Y. 576.

<sup>6</sup> *Pond v. Metropolitan Elevated Ry.*, 112 N. Y. 186; *Ottentot v. N. Y., L. & W. Ry. Co.*, 119 N. Y. 603; *Tallman v. Metropolitan Elevated Ry.*, 121 N. Y. 119. See *Pappenheim v. Metropolitan Elevated Ry.*, 128 N. Y. 436.

<sup>7</sup> *Pappenheim v. Metropolitan Elevated Ry.*, *supra*; *Galway v. Metropolitan Elevated Ry.*, 128 N. Y. 132; *Kernochan v. Manhattan Ry. Co.*, 161 N. Y. 339; *Westphal v. City of New York*, 177 N. Y. 140; *Woolsey v. N. Y. Elevated Ry.*, 134 N. Y. 323; *McElroy v. Kansas City*, 21 Fed. 257; *Ingersoll v. Newton*, 60 N. J. Eq. 399 (reversing 57 N. J. Eq. 367, on another ground); *Patton v. Olympia Door Co.*, 15 Wash. 210. See also *Gray v. M. R. Co.*, 128 N. Y. 499. In *Long Island R. R. Co. v. Garvey*, 159 N. Y. 334, the railroad succeeded by condemnation in doing what it had been unconditionally restrained from doing in *Garvey v. Long Island R. R. Co.*, 159 N. Y. 323 — running a turntable and steam trains near the plaintiff's premises.

<sup>8</sup> *Stetson v. Chicago & Evanston R. R.*, 75 Ill. 74. See AMES, CASES ON EQUITY, 599, note 4 and cases cited.

<sup>9</sup> *Elwell v. Eastern R. R.*, 124 Mass. 160; *Evans v. M. I. & N. Ry. Co.*, 64 Mo. 453 (railroad insolvent). See LEWIS, EMINENT DOMAIN, 3 ed., § 883 (618) and cases cited.

fore, because of the anomalous rule of damages at law, is such equitable interference justifiable.<sup>10</sup> The basis of this relief in other jurisdictions is said to be the necessity of protecting the private landowner, because of his unequal position, against the abuse of the extensive power of eminent domain granted to large corporations.<sup>11</sup> But, unless the corporation is irresponsible or insolvent, the only hardship on the plaintiff in leaving him to his remedy at law is a possible delay in receiving compensation.<sup>12</sup> In other words, it would seem that the plaintiff, to entitle him to such a conditional injunction, should show his remedy at law to be inadequate.<sup>13</sup> Moreover, even assuming that there may be proper equitable jurisdiction in the case of land appropriated, the difficulty of accurately determining damages in advance may give cause for a different rule where no land is actually taken. For until the structure is built and trains are running, it may be speculative even to say that any legal right of the plaintiff will be infringed; then, too, a rise in the value of the lands in the vicinity because of the improvement may reduce his claim to nominal damages.<sup>14</sup> It is true that this argument applies equally against condemning in advance these intangible rights; but it is not a great hardship to make the plaintiff wait until he has been actually damaged before suing at law for compensation.

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THE JURISDICTION OF EQUITY OVER THE REALTY OF AN INFANT. — Whenever a suit is instituted in a court of chancery relative to an infant's person or property, the infant is treated as the ward of the court, under its special cognizance and protection.<sup>1</sup> This jurisdiction seems to have had its origin in the functions of the king as *parens patriae*, and to have been transferred to the courts of chancery at an early date.<sup>2</sup> The infant's personal estate, even though derived as an income from realty, has always been at the disposition of the court.<sup>3</sup> His legal estates in realty, however, could not, by the old English law, be converted into personalty.<sup>4</sup> The reason for the distinction appears to have been that by changing the nature of the minor's estate from real to personal, the rights of third persons who would be entitled to succeed in case of the minor's death would be materially affected, inasmuch as personalty and realty descended in different channels.<sup>5</sup> Although this reason may once have been valid, it loses all force in view of the modern doctrine of equitable conversion, by which the proceeds of realty are treated in equity as realty until the infant, upon reaching majority, exercises his election.<sup>6</sup> Consequently many of our states have

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<sup>10</sup> See *Pond v. Metropolitan Elevated Ry.*, 112 N. Y. 186, 189.

<sup>11</sup> See *East R. R. v. E. T. R. R.*, 75 Ala. 275.

<sup>12</sup> See *McElroy v. Kansas City*, 21 Fed. 257.

<sup>13</sup> In *McElroy v. Kansas City*, *supra*, the insolvency of the corporation was considered in determining the balance of convenience.

<sup>14</sup> *Bohm v. Metropolitan Elevated Ry.*, 129 N. Y. 576.

<sup>1</sup> *Lloyd v. Kirkwood*, 112 Ill. 329; *Rogers v. McLean*, 34 N. Y. 536.

<sup>2</sup> See *Losey v. Stanley*, 147 N. Y. 560, 569.

<sup>3</sup> *Winchester v. Norcliffe*, 1 Vern. 434; *Matter of Stevens*, 114 N. Y. App. Div. 607.

<sup>4</sup> *Russel v. Russel*, 1 Molloy, 525; *Calvert v. Godfrey*, 6 Beav. 97.

<sup>5</sup> See *Hale v. Hale*, 146 Ill. 227, 249; *Richards v. East Tennessee, etc. Ry. Co.*, 106 Ga. 614, 635.

<sup>6</sup> *In re McMillan*, 126 N. Y. App. Div. 155.



rejected the English distinction and asserted an inherent power in their equity courts to decree the sale of infants' lands.<sup>7</sup> The need of such jurisdiction is obvious in the case of infants whose estates are burdened with unproductive realty; and its wisdom is everywhere recognized by remedial legislation. Despite the statutes, however, the question of inherent jurisdiction is not yet at rest, but emerges when strict compliance has not been made with statutory provisions.<sup>8</sup>

A recent case tests the jurisdiction of equity from an unusual point of view. The plaintiff purchased a farm from infant heirs under a contract and deed, both of which recited the contents of the farm as "245 acres, more or less." After the sale had been completed and ratified by the court on the infants' behalf, the plaintiff discovered that the farm contained only 235 acres. He thereupon brought a bill in equity against his vendors, asking for an abatement in the purchase price, and was allowed to recover. *McComb v. Gilkeson*, 66 S. E. 77 (Va.). Reformation because of a mutual mistake of fact is one of the most common grounds of equitable jurisdiction; and there can be no doubt that a court may intervene to rescind or reform an executed transaction for the benefit of an infant.<sup>9</sup> In the present case, however, the decree was adverse to the infants. The statutes empowering the sale of infants' lands explicitly limit the jurisdiction to sales which are made in the interest of the infant. It has accordingly been held that since the court has no general jurisdiction to decree the sale of infants' lands, it cannot decree reformation adversely to an infant where his guardian and the purchaser have made a mutual mistake of fact respecting the amount of land covered by the deed.<sup>10</sup> The decision in the present case is manifestly more just and might possibly be reached without logical difficulty on a more liberal interpretation of the statute. Nevertheless, the case suggests the practical advantage of admitting an inherent power in a court of equity, as paramount guardian, to deal as freely with the realty of infants as with their personality.<sup>11</sup>

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PRIVILEGE OF NON-RESIDENT PARTIES AND WITNESSES FROM SERVICE OF PROCESS. — From early times parties and witnesses in any form of judicial proceeding have been privileged from arrest on civil process, *eundo, morando, et redeundo*.<sup>1</sup> The privilege was not primarily personal, but rather the privilege of the court, its object being to prevent any clogging of the

<sup>7</sup> Sale of lands for an advantageous division or better investment: *Dampier v. McCall*, 78 Ga. 607; *King v. King*, 215 Ill. 100; *Fitzpatrick v. Beal*, 62 Miss. 244; *Thorington v. Thorington*, 82 Ala. 489 (sale of infants' estate in remainder). *Contra*, *Elliot v. Fowler*, 112 Ky. 376; *Losey v. Stanley*, 147 N. Y. 560; *Rhea v. Shields*, 103 Va. 305.

<sup>8</sup> *Richards v. East Tennessee, etc. Ry. Co.*, *supra*; *Elliot v. Fowler*, *supra*.

<sup>9</sup> *Reynolds v. McCurry*, 100 Ill. 356.

<sup>10</sup> *Dickey v. Beatty*, 14 Oh. St. 380.

<sup>11</sup> A case decided subsequently to the principal case wrought a distinct hardship upon an infant by refusing inherent jurisdiction over his land. The infant took an interest in land under a will which was refused probate because of invalidity. The infant's claim was thereafter advantageously compromised with the sanction of the court. Upon a dispute as to the title of the land, the settlement was held ineffectual. *Dixon v. Cozine*, 64 N. Y. Misc. 602.

<sup>1</sup> VINER, ABRIDGMENT, Tit. "Privilege," B. pl. 3 (Party); C. pl. 16 (Witness).

judicial machinery. So it was a contempt to arrest a privileged person, or, in the court's presence, even to serve summons upon him;<sup>2</sup> at the same time the privileged party could not abate the suit.<sup>3</sup>

England has long recognized that non-residents deserve special favor;<sup>4</sup> but the growth of their privilege has been more carefully worked out in this country, where some of the parties or material witnesses to any suit are so frequently from jurisdictions other than that of the forum. Although a court can command the presence of those within its jurisdiction, it must invite those from without.<sup>5</sup> For while remaining at home a non-resident retains the fundamental and very substantial right to be sued there and only there;<sup>6</sup> a right which he will not lightly endanger by voluntarily submitting to another jurisdiction in order there to testify, sue, or be sued. At a time when an arrest could be had on almost every civil action,<sup>7</sup> exemption simply from arrest afforded him a substantially inclusive privilege. To-day, however, to give the court jurisdiction, the defendant need only be notified, not haled into court; and since, therefore, the *capias* has become the rare exception, and the summons the normal original process, the non-resident demands more than exemption from arrest.<sup>8</sup> Accordingly, he was early<sup>9</sup> granted immunity from service of summons, and the privilege is now well-nigh universal.<sup>10</sup> An anomalous exception, however, that parties plaintiff are not thus privileged<sup>11</sup> is perpetuated in a strong *dictum* of a recent case. *Chittenden v. Carter*, 74 Atl. 884 (Conn.). It is everywhere agreed that parties defendant are privileged;<sup>12</sup> but it is argued that as parties plaintiff have set in motion the wheels of justice, they should abide the consequence of being sued in turn. But the great weight of authority<sup>13</sup> holds that as each person is properly to be sued at home, that right is not forfeited by entering the jurisdiction to sue a resident.<sup>14</sup>

To extend this privilege to non-resident defendants in criminal proceedings is to lose sight of the reason for the rule. It is one thing to encourage voluntary submission by a non-resident not otherwise obtainable; it is quite a different thing to accord to the prisoner dragged into the jurisdic-

<sup>2</sup> *Cole v. Hawkins*, Andr. 275.

<sup>3</sup> VINER, ABRIDGMENT, Tit. "Privilege," B. pl. 24; *Poole v. Gould*, 1 H. & N. 99 (disregarding the rule that the privilege extended to summons, as laid down in CHITTY'S ARCHBOLD PRACTICE, 9 ed., 174).

<sup>4</sup> *Walpole v. Alexander*, 3 Doug. 45.

<sup>5</sup> See WORKS, COURTS AND THEIR JURISDICTION, § 37.

<sup>6</sup> *Jacobson v. Hosmer*, 76 Mich. 234; *Hale v. Wharton*, 73 Fed. 739. See also ALDERSON, JUDICIAL WRITS, § 113 *et seq.*, for a full discussion of the matter.

<sup>7</sup> 3 BLACKSTONE, COMMENTARIES, 282.

<sup>8</sup> WORKS, COURTS AND THEIR JURISDICTION, § 35.

<sup>9</sup> *Halsey v. Stewart*, 4 N. J. L. 426; *Parker v. Hotchkiss*, 1 Wall. Jr. (U. S.) 269.

<sup>10</sup> *Mitchell v. Huron Circuit Judge*, 53 Mich. 541 (privilege need not be extended to residents); *Andrews v. Lembeck*, 46 Oh. St. 38 (whether non-residents of county or of state. But see *Massey v. Colville*, 45 N. J. L. 119); *Wilson v. Donaldson*, 117 Ind. 356; *Sherman v. Gundlach*, 37 Minn. 118. But see *Cassem v. Galvin*, 158 Ill. 30.

<sup>11</sup> *Bishop v. Vose*, 27 Conn. 1; *Baldwin v. Emerson*, 16 R. I. 304; *Guynn v. McDaniel*, 4 Ida. 605.

<sup>12</sup> This is true even in Connecticut. *Wilson Sewing Machine Co. v. Wilson*, 51 Conn. 595. *Contra*, *Capwell v. Sipe*, 17 R. I. 475.

<sup>13</sup> *In re Healey*, 53 Vt. 694; *Hale v. Wharton*, 73 Fed. 739. The special nature of the remedy sought will explain *Mullen v. Sanborn*, 79 Md. 364.

<sup>14</sup> The privilege, being founded on common-law principles, is not derogated by statutes allowing service on a defendant "wherever found." *Wilson v. Donaldson*, 117 Ind. 356. *Contra*, *Christian v. Williams*, 111 Mo. 429.



tion perforce, a privilege denied to residents.<sup>15</sup> It is true that one extradited from a foreign country is privileged at least from arrest on civil process.<sup>16</sup> But this is because of the express provisions of treaties; whereas interstate rendition is a matter not of comity but of constitutional right. So, too, the privilege extends to one brought into the jurisdiction on charges trumped up for the purpose.<sup>17</sup> But that is only one instance under the broader independent rule that all persons, whether concerned in judicial proceedings or not, who are brought into the jurisdiction improperly, as by fraud or force, are privileged.<sup>18</sup> Some courts, however, privilege all non-resident defendants in criminal actions.<sup>19</sup> Thus privilege from arrest was given in *Weale v. Clinton Circuit Judge*, 123 N. W. 31 (Mich.). But on the other hand, privilege even from summons was denied in *Netrograph Mfg. Co. v. Scrugham*, 197 N. Y. 377. In the latter case the fact that the prisoner's return on bail was in a sense voluntary affords ground for an arguable distinction;<sup>20</sup> yet as he was always potentially in the power of the court, privilege was properly denied him.<sup>21</sup>

In short, any one not subject to interstate rendition, coming voluntarily from without the jurisdiction to participate therein in any form of judicial proceeding, either civil or criminal, should be privileged from service of all civil process while remaining in the jurisdiction<sup>22</sup> for the original purpose.<sup>23</sup>

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RISK OF LOSS AFTER AN EXECUTORY CONTRACT FOR THE SALE OF REAL ESTATE. — If, after an executory contract for the sale of real estate, the property is destroyed by fire,<sup>1</sup> upon whom should the loss fall? Where the calamity is occasioned by the fault of either of the contracting parties, or where the contract expressly provides for risk of loss,<sup>2</sup> the answer is simple; but further than this neither the courts nor students of the law<sup>3</sup> are agreed. As failure of consideration is ground for rescinding a contract, the destruction of any considerable part of the *res* before performance ends all

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<sup>15</sup> *Goodwin v. Lordon*, 1 A. & E. 378; *Hare v. Hyde*, 16 Q. B. N. s. 394; *Scott v. Curtis*, 27 Vt. 762.

<sup>16</sup> *In re Reinitz*, 39 Fed. 204.

<sup>17</sup> *Byler v. Jones*, 79 Mo. 261.

<sup>18</sup> *Williams v. Reed*, 29 N. J. L. 385.

<sup>19</sup> *Moletor v. Sinnen*, 76 Wis. 308; *Jacobson v. Hosmer*, 76 Mich. 234; *State ex rel. Hattabaugh v. Boynton*, 121 N. W. 887 (Wis.).

<sup>20</sup> *Gilpin v. Cohen*, L. R. 4 Ex. 131.

<sup>21</sup> *Reid v. Ham*, 54 Minn. 305. *Contra*, *Kaufman v. Garney*, 173 Fed. 550; *Martin v. Bacon*, 76 Ark. 158.

<sup>22</sup> The privilege should not extend to causes of action arising therein. See *Nichols v. Horton*, 14 Fed. 327, 330.

<sup>23</sup> The privilege may be set up by a plea in abatement, or preferably by a motion on special appearance. See *Thornton v. American Writing Machine Co.*, 83 Ga. 288.

<sup>1</sup> For losses from other causes, involving the same question, see 15 HARV. L. REV. 733 (eminent domain); *Poole v. Shergold*, 2 Bro. C. C. 118 (blowing down of timber); *Kenney v. Wexham*, 6 Madd. 355 (death of *cestui que vie* in sale of annuity).

<sup>2</sup> See *Marks v. Tichenor*, 85 Ky. 536. The courts examine the contract closely for any indication of the parties' intention as to risk of loss. See *Allyn v. Allyn*, 154 Mass. 570.

<sup>3</sup> See 1 HARV. L. REV. 373 *et seq.*; 9 HARV. L. REV. 106; 1 COLUMBIA L. REV. 1.

liabilities<sup>4</sup> under a contract contemplating the continued existence of that *res*.<sup>5</sup> And several decisions<sup>6</sup> go on the theory that the parties must, from the nature of the contract, have contemplated that the property when conveyed be in substantially its original condition; so that, if the vendor cannot convey such property, he has no recourse against the purchaser in case of loss.

A second view, regarding, not the legal title, but the *jus fruendi* of the original premises as the substantial thing bargained for, arrives at the conclusion that the party in possession should be the loser.<sup>7</sup> And the party in possession is usually the vendor. That the vendor has, in the absence of express circumstances, the right of possession<sup>8</sup> and profits<sup>9</sup> up to the date of conveyance is undeniable; but the explanation is, that since he is not entitled to interest on the purchase price from the date of the agreement,<sup>10</sup> it would be unfair to deprive him, even temporarily, of the beneficial use of both the money and the land.<sup>11</sup>

As equity, however, will give specific performance of a contract<sup>12</sup> for the sale of land, the purchaser, though not entitled to possession immediately upon the making of the contract, does acquire certain proprietary rights. The relation created is, in many respects, similar to that of a mortgage or trust.<sup>13</sup> For, while the vendor is not held to all the active duties of a trustee,<sup>14</sup> he is at least bound to take some care of the land for the purchaser,<sup>15</sup> who also profits by all fortuitous improvements.<sup>16</sup> The purchaser has, moreover, every lawful right to dispose<sup>17</sup> of the property; and his assignee or appointee, upon fulfilling the purchaser's part of the contract, is entitled to the land as against all but a *bonâ fide* purchaser.<sup>18</sup> If either of the contracting parties dies before completion, all rights to the property and to the purchase money rest on the assumption that the land was in effect held in

<sup>4</sup> It is optional with a purchaser, of course, to accept the damaged property. *Hallett v. Parker*, 68 N. H. 598.

<sup>5</sup> *Howell v. Coupland*, 1 Q. B. D. 258.

<sup>6</sup> See *Wells v. Calnan*, 107 Mass. 514; *Hawkes v. Kehoe*, 193 Mass. 419; *Gould v. Murch*, 70 Me. 288.

<sup>7</sup> This view has received little support in the language, at least, of the courts. See *AMES' CASES ON EQUITY*, 236, note 1.

<sup>8</sup> *Robertson v. Skelton*, 12 Beav. 260; *Burnett v. Caldwell*, 9 Wall. (U. S.) 290.

<sup>9</sup> *Lumsden v. Fraser*, 12 Simons 263. *Contra*, *Wimbish v. The Montgomery Mutual Building & Loan Ass.*, 69 Ala. 575.

<sup>10</sup> *Minard v. Beans*, 64 Pa. St. 411.

<sup>11</sup> See *Fludyer v. Cocker*, 12 Ves. 25; *Siemers v. Hunt*, 28 Tex. Civ. App. 44.

<sup>12</sup> Unless the contract is one which equity will enforce, the loss must fall on the seller. *Blew v. McClelland*, 29 Mo. 304 (contract not complying with Statute of Frauds).

<sup>13</sup> This relation is clearly recognized even in Massachusetts. See *Felch v. Hooper*, 119 Mass. 52.

<sup>14</sup> He is not bound, for example, to insure for the benefit of the purchaser. See *Rayner v. Preston*, 18 Ch. D. 1; *Ins. Co. v. Updegraff*, 21 Pa. St. 513.

<sup>15</sup> *Clarke v. Ramuz*, L. R. [1891] 2 Q. B. 456 (waste); *Earl of Egmont v. Smith*, 6 Ch. D. 469 (failure to keep land cultivated and tenanted); *Holmberg v. Johnson*, 45 Kan. 197. *Contra*, *Hellreigel v. Manning*, 97 N. Y. 56.

<sup>16</sup> See *Paine v. Meller*, 6 Ves. 349; *Woodward v. McCollum*, 111 N. W. (N. D.) 623.

<sup>17</sup> He has the right to sell, mortgage, or devise the land. See *Shaw v. Foster*, L. R. 5 H. L. 321, 338. The vendor cannot even subject it to a servitude. *Hallett v. Parker*, *supra*. And the property is no longer liable for the vendor's debts. *Blackmer v. Phillips*, 67 N. C. 340.

<sup>18</sup> See *Taylor v. Kelly*, 3 Jones, Eq. (N. C.) 240. In this country the purchaser can, by recording the contract of sale, prevail over any possible claimant.



trust for the vendee.<sup>19</sup> Similarly, in insurance the purchaser,<sup>20</sup> and not the vendor,<sup>21</sup> is regarded as the sole, unconditional owner under a condition providing that the policy shall be void unless the assured has such an interest. In view, therefore, of this equitable ownership arising from the mere contract relation, the fairest rule — that adopted in England<sup>22</sup> and in the majority of jurisdictions in this country<sup>23</sup> — lays the risk of loss from the moment of the contract upon the purchaser.

As each of these three rules seems to find some support in the New York cases,<sup>24</sup> it is noteworthy that the latest decision in that jurisdiction, though on its facts sustainable on the test of possession, expressly adopts the prevailing rule. *Sewell v. Underhill*, 197 N. Y. 168 (Ct., App.).

## RECENT CASES.

AGENCY — AGENT'S LIABILITY TO THIRD PERSONS — WARRANTY OF AUTHORITY BY AGENT. — The defendant employed solicitors to defend him in an action for libel, and requested the plaintiff to address further communications to them. He was thereafter adjudged insane. In ignorance of this fact, the solicitors continued to act as the defendant's attorneys, until the plaintiff, learning the circumstances, moved that the action be struck out and that the solicitors pay the costs. *Held*, that the motion be granted. *Yonge v. Toynbee*, 26 T. L. R. 211 (Eng., Ct. App., Dec. 21, 1909).

The leading case on the question raised by the principal case merely held that an agent impliedly warrants that he has not exceeded his authority. *Collen v. Wright*, 7 E. & B. 301. But this doctrine has been applied to the case of an agent professing to have authority to make a contract which his principal would have been unable to make. *Richardson v. Williamson*, L. R. 6 Q. B. 276. It has also been extended so that persons who in fact have no authority whatever, are held to warrant that they have such authority as they profess. *Starkey v. Bank of England*, [1903] A. C. 114. Inconsistently with this development of the doctrine, it had previously been held that a person who had been an agent does not warrant that his authority has not been terminated by operation of law, as by the death or insanity of his principal. *Smout v. Ilbery*, 10 M. & W. 1; *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43. Although in these cases the facts on which the agent's

<sup>19</sup> Thus if a statute gives dower in equitable estates, the widow of the vendee has dower. *Thompson v. Thompson*, 1 Jones (N. C.) 430. Conversely, the widow of the vendor has none. *Dean's Heirs v. Mitchell's Heirs*, 4 J. J. Marshall (Ky.) 451. The vendee's heir, rather than his personal representative, is entitled to a conveyance. *Milner v. Mills*, *Moseley* 123. The purchase money goes to the vendor's personal representative, not his heir. *Green v. Smith*, 1 Atkyns 572. The legal title passes under a devise by the vendor of his "trust estates." *Lysaght v. Edwards*, 2 Ch. D. 499.

<sup>20</sup> *Pelton v. The Westchester Fire Ins. Co.*, 77 N. Y. 605; *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615.

<sup>21</sup> *Hamilton v. The Dwelling House Ins. Co.*, 98 Mich. 535.

<sup>22</sup> See *Paine v. Meller*, *supra*; *Poole v. Adams*, 33 L. J. Ch. n. s. 639. An early dictum was *contra*. See *Stent v. Bailis*, 2 P. Wms. 217. *Cf.* *Bacon v. Simpson*, 3 M. & W. 78; *Taylor v. Caldwell*, 3 B. & S. 826.

<sup>23</sup> See *Marks v. Tichenor*, *supra*; *Marion v. Wolcott*, 68 N. J. Eq. 20; *Woodward v. McCollum*, *supra*.

<sup>24</sup> See *Gates v. Smith*, 4 Edw. Ch. 702; *McKechnie v. Sterling*, 48 Barb. 330; *Clington v. Hope Ins. Co.*, 45 N. Y. 454; *Wicks v. Bowman*, 5 Daly 225; *Pelton v. Westchester Fire Ins. Co.*, *supra*; *Smyth v. Sturges*, 108 N. Y. 495; *Goldman v. Rosenberg*, 116 N. Y. 78; *Listman v. Hickey*, 65 Hun 8.

authority depended were equally known by both parties, that seems an insufficient ground for distinction. *Starkey v. Bank of England*, *supra*. *Contra*, *Newport v. Smith*, 61 Minn. 277. An agent can escape liability only by expressly bringing home to the party with whom he contracts his intention not to warrant his authority. *Lilly, Wilson, & Co. v. Smales, Eales, & Co.*, [1892] 1 Q. B. 456. So the principal case seems correct in overruling *Smout v. Ilbery*.

**BANKRUPTCY — INVOLUNTARY PROCEEDINGS — JOINING ADDITIONAL CREDITORS IN PETITION.** — A filed a petition in involuntary bankruptcy against B, alleging that B had less than twelve creditors, and naming as an act of bankruptcy a preference given to the defendant. The defendant's answer disclosed that B had more than twelve creditors. The requisite number of creditors then joined with A in an amendment which was filed more than four months after the commission of the act of bankruptcy. *Held*, that the amendment relates back to the date of filing the original petition. *First State Bank of Corinth v. Haswell*, 174 Fed. 209 (C. C. A., Eighth Circ.).

A petition in involuntary bankruptcy can be amended in minor particulars at the discretion of the court according to the general rules governing amendments of pleadings. *Armstrong v. Fernandez*, 208 U. S. 324. Section 59 *f* of the Bankruptcy Act of 1898 provides that "creditors other than the original petitioners may at any time enter their appearance and join in the petition." Under this section it has been repeatedly held, in accord with the principal case, that additional creditors can be joined to cure a jurisdictional defect in the petition more than four months after the commission of the act of bankruptcy. *In re Romanow*, 92 Fed. 510; *Ryan v. Hendricks*, 166 Fed. 94. This provision seems unfortunate, as it apparently deprives the court of all discretion in permitting the intervention of additional creditors in the petition, and it would seem that an utterly worthless petition filed by persons who are not creditors at all, may be cured by joining real creditors after the four months' period has elapsed. The decisions that additional creditors cannot be joined more than four months after the act of bankruptcy if the jurisdictional defect appears on the face of the petition seem questionable. See *In re Stein*, 130 Fed. 377; *In re Bedingfield*, 96 Fed. 190.

**BILLS AND NOTES — PURCHASER FOR VALUE WITHOUT NOTICE — PLEDGEE AS INNOCENT PURCHASER.** — The plaintiff made a note payable to the order of his agent for the purpose of negotiation. After telling the plaintiff that the note had been destroyed, the agent without indorsing it, pledged it for a personal loan to the defendant who took it in good faith. The plaintiff asked that the defendant be restrained from suing and that the note be canceled. *Held*, that the decree will not be granted. *Sublette v. Brewington*, 122 S. W. 1150 (Mo., Kan. City Ct. App.).

When a note payable to order is transferred without indorsement, the transferee takes subject to all equities attached to it, even though he is a *bonâ fide* purchaser for value. *Goshen National Bank v. Bingham*, 118 N. Y. 349; *Southard v. Porter*, 43 N. H. 379. The Negotiable Instruments Law is to the same effect. See BRANNAN, NEG. INST. LAW, §§ 52, 58. The plaintiff can, however, disregard the note and recover on the contract created by the agency. *Harper v. National Bank*, 54 Oh. St. 425. See *Ducarrey v. Gill*, M. & M. 450. But as the note in the principal case was payable to the order of the agent, it would seem that a transfer made without indorsement was not within the scope of his authority. Accordingly the principal would not be bound thereby; for an agent to sell has no authority to pledge. See *Warner v. Martin*, 11 How. (U. S.) 209, 224. Then too, the agency, which was solely for this special purpose, seems to have been terminated by the agent's telling his principal that the note was destroyed. No notice of the revocation in such cases is necessary. *Watts v. Kavanagh*, 35 Vt. 34. Therefore the subsequent wrongful act of the agent could not bind the principal. *Fuentes*



v. *Montis*, L. R. 3 C. P. 268. Unless the decision can be upheld on the ground that there is no need for equitable relief because there is a complete defence at law, it would seem to be erroneous.

**BILLS OF PEACE — INSURANCE COMPANIES SEEKING TO ENJOIN SEPARATE ACTIONS.** — A, being insured in nineteen companies upon the same property, instituted as many separate actions in the state court. The policies were similar and each contained an apportionment clause. The companies set up a common ground of defense. Fifteen of the defendants removed their suits to the federal court and then joined in a common bill in equity against A and the remaining four companies to have their liability determined and the loss apportioned. *Held*, that the bill will not lie. *Mechanics' Ins. Co. v. Hoover Distilling Co.*, 173 Fed. 888 (C. C. A., Eighth Circ.).

The precise situation here presented has arisen in several earlier cases, and the bill has commonly been allowed. *Rochester German Insurance Co. v. Schmidt*, 126 Fed. 998; *Tisdale v. Insurance Co. of N. A.*, 84 Miss. 709. The objection to equitable jurisdiction seems twofold: (1) No one of the complainants is subject to a multiplicity of suits, and (2) there is no privity between them. The first objection assumes a requirement for bills of peace which has never in fact existed. *Ewelme Hospital v. Andover*, 1 Vern. 265. The requirement of privity has been repudiated by numerous leading cases both in this country and in England. *New York & New Haven R. R. Co. v. Schuyler*, 17 N. Y. 592; *Sheffield Water Works v. Yeomans*, L. R. 2 Ch. 8. The jurisdiction is properly discretionary, to be exercised whenever there is a community of interest in the question of law or fact involved and when the procedure at law is inadequate. See *Hale v. Allinson*, 188 U. S. 56, 77. In the present case the insurance companies are coobligors. The insolvency of one would increase the liability of every other, and no company could regard itself as discharged until all the suits against all the others had been prosecuted to judgment and the judgments satisfied. Since a bill in equity can dispose of all the obligations in a single action and lessen the time and expense of litigation for every party involved, the decision seems most unfortunate.

**BOUNDARIES — WHETHER GRANTEE TAKES TO CENTER OF CLOSED STREET.** — A conveyed to B two lots abutting on a street which had been vacated by the city. *Held*, that B takes only to the edge of the street. *White v. Jefferson*, 121 N. W. 373 (Minn.).

When land on the side of a public road or street is conveyed, the parties are presumed to intend that the land to the center of the road is included. See 3 KENT, COM. 434; *Boston v. Richardson*, 13 Allen (Mass.) 146. In some of the earlier cases the courts refused to apply this presumption when the words of the deed gave any indication that the side of the way was to be the boundary, on the ground that land cannot pass as appurtenant to land. *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Tyler v. Hammond*, 11 Pick. (Mass.) 193, 213. Now, however, it is generally held that the grantee takes to the center, unless the way is expressly excluded. *Paul v. Carver*, 26 Pa. St. 223; *Salter v. Jonas*, 39 N. J. L. 469. But see *Buck v. Squiers*, 22 Vt. 484. The rule is based on a sound public policy against the ownership of isolated strips of land, and on the view that the center of a way, like the central line of other boundaries, should be the dividing line. Therefore the presumption is held to apply to unopened streets. *Bissell v. The New York Central R. R. Co.*, 23 N. Y. 61; *Falls v. Reis*, 74 Pa. St. 439. *Contra*, *Palmer v. Dougherty*, 33 Me. 502. But a recent Connecticut case held, against the weight of authority, that the presumption does not apply to private ways. *Seery v. City of Waterbury*, 74 Atl. 908 (Conn.). *Contra*, *Fisher v. Smith*, 9 Gray (Mass.) 441; *Pitney v. Husted*, 8 N. Y. App. Div. 105. It is submitted that the same considerations which make this presumption desirable in other cases, apply to streets which have been closed. *Paine v. Consumers' Forwarding & Storage Co.*, 71 Fed. 626.

**CARRIERS — CUSTODY AND CONTROL OF GOODS — WHEN RAILROAD BECOMES WAREHOUSEMAN.** — Freight consigned to the plaintiff arrived at its destination and was placed in the defendant's depot from twelve hours to three days before the building and its contents were burned without negligence on the defendant's part. *Held*, that the lower court erred in ruling that the defendant is not liable. The jury should have been instructed that unless the plaintiff failed to remove the goods within a reasonable time after he knew or, by the exercise of reasonable diligence, could have known of their arrival, he can recover. *Lewis v. Louisville & N. R. R. Co.*, 122 S. W. 184 (Ky.).

There are three conflicting views as to how soon after the arrival of freight at its destination, a railroad's responsibility changes from that of common carrier to that of warehouseman. Some jurisdictions hold that liability as a carrier ceases as soon as the freight is put in a proper place for the consignee to take it away. *Thomas v. R. R.*, 10 Met. (Mass.) 472. Others hold that such liability ceases after a reasonable time for removal. *Moses v. R. R.*, 32 N. H. 523. A third rule requires both that notice of arrival be given to the consignee and that he have a reasonable time thereafter to remove the goods. *Fenner v. Buffalo & St. Louis R. R. Co.*, 44 N. Y. 505. See 9 HARV. L. REV. 153. In the principal case the court follows an earlier *dictum* approving the New Hampshire rule and saying that notice need not be given to the consignee. *R. R. v. Cleveland*, 2 Bush (Ky.) 468. Since the carrier in fact undertakes both to carry and to give such warehousing as will be incidental to carriage, it is submitted that the exceptional liabilities of a carrier should cease as soon as the transit is in fact ended. Thereafter the liability should be only that of a warehouseman.

**CONSTITUTIONAL LAW — POWERS OF THE JUDICIARY — INJUNCTION BY FEDERAL COURT AGAINST ENFORCING RAILROAD RATES FIXED BY STATE COMMISSION.** — The Oklahoma constitution established a commission to fix railroad rates and provided for an appeal to the supreme court of the state, where, if the order of the commission was not affirmed, a new order of the same nature would be substituted. A railroad company was denied leave to give bond to suspend the operation of the order pending appeal. The company filed a bill in the federal court, alleging that the rates were confiscatory and praying a temporary injunction against the enforcement of the order. *Held*, that an injunction should issue. *Atchison, Topeka, & Santa Fe Railway Co. v. Love*, 174 Fed. 59 (Circ. Ct., W. D. Okl.).

It is admitted that the United States courts have power to enjoin proceedings under state legislation which is clearly unconstitutional. See *Willcox v. Consolidated Gas Co.*, 212 U. S. 19. And it is the better opinion that in determining rates, a commission acts in a legislative capacity. See *Interstate Commerce Commission v. Cincinnati, New Orleans, & Texas Pacific Railway Co.*, 167 U. S. 479, 499. *Contra*, *People v. Willcox*, 194 N. Y. 383. A statute which provides that the commission's determination of reasonable rates shall be conclusive is unconstitutional. *Chicago, Milwaukee, & St. Paul Railway Co. v. Minnesota*, 134 U. S. 418. And similarly, a commission cannot be created with judicial power to determine the reasonableness of the rates which it has established. *Western Union Telegraph Co. v. Myatt*, 98 Fed. 335. But under constitutional provisions and facts identical with those in the principal case, except that there was no attempted enforcement of the rates, it was held that no injunction would issue until the state court had passed upon the rates, since until then the legislation was incomplete. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210. This decision was expressly limited to the actual facts presented. See 22 HARV. L. REV. 368. For this reason, the distinction taken in the principal case is justifiable although perhaps unnecessary. The result reached seems correct, for unquestionably there are proper grounds for equitable relief.

**CORPORATIONS — CORPORATIONS DE FACTO — COLLATERAL ATTACK ON CORPORATION NOT COLORABLY ORGANIZED.** — The plaintiff sold goods to a cer-



tain company which the associates represented as duly incorporated. A Massachusetts statute provided that no corporation should come into existence without the certificate of the Secretary of the Commonwealth, issued on the filing of its organization papers, which certificate should have the effect of a special charter. When the goods were delivered, the company had not attempted to comply with the statute, though it did so the following day. *Held*, that the plaintiff can replevy the goods. *Whiting & Sons Co. v. Barton*, 90 N. E. 528 (Mass.).

Questions as to collateral attack upon incorporation usually have arisen in this country where there has been partial, but not complete, compliance with the provisions of a general incorporation law. *Callender v. Painesville & Hudson R. Co.*, 11 Oh. St. 516. But under the Massachusetts statute this question should seldom arise. See MASS. ACTS OF 1903, c. 437, § 12. Yet the case of a naked assumption of the corporate privilege, that is, an assumption where there has been no attempt to comply with the provisions of any law authorizing incorporation, sometimes arises, as in the principal case. Under such circumstances, Massachusetts applies the common-law rule. No title passed to the corporation when the goods were delivered, for the supposed buyer did not then exist. *Penn Match Co. v. Hapgood*, 141 Mass. 145. So the associates could have been held to full liability. *Johnson v. Corser*, 34 Minn. 355. See *Finnegan v. Noerenberg*, 52 Minn. 239, 243. But the vendor elected to look to the goods. And it could hardly have been maintained that title had passed out of the plaintiff, for the plaintiff's only intent was to pass title to the corporate unit. See *Byam v. Bickford*, 140 Mass. 31. Nor was there evidence of a new sale after the corporation was formed. See *Pennell v. Lothrop*, 191 Mass. 357, 360. Nor was the plaintiff in any way estopped from asserting title. So the court rightly allowed collateral attack, refusing to consider the naked assumption as a foundation of rights. See *The Detroit Schnetzen Bund v. The Detroit Agitations Verein*, 44 Mich. 313.

EMINENT DOMAIN — COMPENSATION — RIGHT TO ENJOIN NUISANCE UNTIL COMPENSATION IS MADE. — An owner of land abutting on the defendant's railway brought a bill to enjoin its use until compensation had been made for the injury to the plaintiff's property by reason of smoke, noise, etc. *Held*, that the plaintiff is not entitled to the injunction. *Hyde v. Minnesota, D. & P. Ry.*, 123 N. W. 849 (S. D.). See NOTES, p. 471.

EQUITABLE CONVERSION — ORDER OF COURT FOR SALE OF LAND. — An absolute order of court was given for the sale of land subject to an incumbrance. The owner died after the order had been issued but before the sale was actually made. *Held*, that his next of kin are entitled to the surplus. *In re Estate of Stinson*, [1910] 1 Ir. 13.

If an executor is unconditionally ordered to sell land, the beneficiaries no longer have any equitable right in the land; and their right descends as personalty to their next of kin. *Hyett v. Meekin*, 25 Ch. D. 735. But it has been held in partition proceedings that if a legal owner die after the court has ordered a sale, but before the proper time for the completion of the sale, the heirs take. *Biggert's Estate*, 20 Pa. St. 17. For an order to sell does not of itself divest legal title. Nor should equity treat the title as divested until after the time when the sale has been ordered to be made. Thereafter the owner's interest is regarded as personalty, equity regarding as done what ought to have been done. In the principal case, if the deceased is regarded as having no legal title at the time of his death either because the incumbrance was of the nature of a mortgage or because the time fixed for the sale was earlier than the owner's death, the decision is analogous to the cases stated above. The case may also be rested on an artificial rule that the court's order of sale works an immediate conversion. See *Burgess v. Booth*, [1908] 2 Ch. 648. To apply such a rule is more convenient but less logical than to analyze in each case the true nature of the rights of the deceased.

**GENERAL AVERAGE — NATURE, CAUSE, AND MANNER OF SACRIFICE — EFFECT OF INHERENT VICE OF CARGO UPON THE RIGHT TO CONTRIBUTION.** — A cargo of garbage tankage took fire by spontaneous combustion. The whole cargo of garbage tankage was destroyed in putting out the fire. The plaintiff insurance company had to indemnify the cargo owner and sued the vessel for a general average contribution. *Held*, that the plaintiff is not entitled to contribution. *Atlantic Mutual Ins. Co. v. Schooner W. J. Quillan*, 42 N. Y. L. J. 1821 (U. S. Dist. Ct., S. D. N. Y., Jan., 1910).

This reverses a former decision in the same case discussed in 22 HARV. L. REV. 452.

**GIFTS — IMPERFECT GIFT — APPOINTMENT OF DONEE AS EXECUTRIX.** — A testator promised that the plaintiff should have £2 a week during her life, and died without altering his intention. The will, of which the plaintiff was executrix, made no such provision. *Held*, that she has no claim against the estate. *In re Inness*, [1910] 1 Ch. 188.

Where an ineffectual release of a debt is made, a leading case has declared that the transaction is completed by the debtor becoming executor under the will of the releasor. *Strong v. Bird*, L. R. 18 Eq. 315. And a recent decision following the *dictum* of the earlier case reached the same result where execution was entrusted to one to whom an imperfect gift had been made. *Stewart v. McLaughlin*, [1908] 2 Ch. 251. See 22 HARV. L. REV. 60. These holdings must, however, be put upon different grounds. Apart from the question whether an unattested act should control testamentary disposition, it is proper for equity to decline to relieve against a release involved in law merely by the appointment of a debtor as executor, provided such release represents the intent of the testator. See 23 HARV. L. REV. 392. But for equity to act affirmatively and give to a donee an interest prevailing over the legal right of legatees is quite another matter. No decision found in this country hints at such a result. And for declining to extend the doctrine to cases in which the *res* is unspecified or a future transference is contemplated, the principal case is to be commended.

**INDICTMENT AND INFORMATION — FINDING AND FILING INDICTMENT — PRESENCE OF EXPERT ACCOUNTANT IN GRAND JURY ROOM.** — At the request of the district attorney, an expert accountant accompanied him into the grand jury room while that body was investigating the charge against the defendant. The accountant assisted the district attorney in examining witnesses, and asked a few technical questions. He did not attempt to influence the jurors. No prejudice to the defendant was shown to have resulted from his presence. *Held*, that the indictment must be quashed. *United States v. Heinze*, (Unreported) Circ. Ct., S. D. N. Y., Jan. 22, 1910.

A defendant prejudiced by the conduct of grand jury proceedings may have the indictment quashed. *United States v. Farrington*, 5 Fed. 343. But as to the presence of an unauthorized person not prejudicing the defendant's rights, the law is in confusion. Generally, a stenographer or bailiff is considered so far an automaton as to be unobjectionable. *State v. Bacon*, 77 Miss. 366; *United States v. Simmons*, 46 Fed. 65. *Contra*, *State v. Bowman*, 90 Me. 363. For the secrecy of the proceedings is said not to be for the defendant's benefit. See *Commonwealth v. Mead*, 12 Gray (Mass.) 167; *State v. Broughton*, 7 Ired. (N. C.) 96. The presence of a stranger who is an active factor in conducting the proceedings is always considered an error. By some courts it is deemed an error of substance; by others, merely an error of form. The principal case follows the weight of the federal decisions in holding that the defendant has received injury in law by the existence of an opportunity for an outsider to influence the grand jury. *United States v. Kilpatrick*, 16 Fed. 765; *United States v. Virginia-Carolina Chemical Co.*, 163 Fed. 66. A number of state courts think the defendant is sufficiently protected



as long as the grand jury itself is legally constituted and the proceedings are actually fair, and hold that the technical error of the outsider's presence is not ground for quashing the indictment. *Blevins v. State*, 68 Ala. 92; *Bennett v. State*, 62 Ark. 516. It is submitted that this error is more properly one of form only, and is therefore cured by the federal statute. See U. S. COMP. ST. (1901) 720, § 1025.

INFANTS — CONTRACTS AND CONVEYANCES — ABATEMENT IN PURCHASE PRICE AT EXPENSE OF INFANTS. — The plaintiff purchased a farm of the defendants. Both the contract of sale and the deed mentioned its contents as "245 acres, more or less." As some of the vendors were infants, the sale was ratified by the court. The plaintiff, later discovering that the farm contained only 235 acres, brought a bill in equity for an abatement of the purchase price. *Held*, that the abatement be allowed. *McComb v. Gilkeson*, 66 S. E. 77 (Va.). See NOTES, p. 473.

INJUNCTION — ACTS RESTRAINED — CRIMINAL PROCEEDINGS. — Three plaintiffs brought a bill to enjoin the sheriff and district attorney from prosecuting them under a state liquor law alleged to be invalid. *Held*, that equity will not grant the injunction. *J. W. Kelly & Co. v. Conner*, 123 S. W. 622 (Tenn.). See NOTES, p. 469.

INJUNCTION — ACTS RESTRAINED — PASSAGE OF MUNICIPAL ORDINANCES. — The plaintiff sought to restrain the members of the council of the defendant city from passing an ordinance compelling the plaintiff to build viaducts over certain crossings. *Held*, that the injunction should be refused. *Chicago, Rock Island, & Pacific Ry. Co. v. City of Lincoln*, 124 N. W. 142 (Neb.). See NOTES, p. 470.

INTERSTATE COMMERCE — CONTROL BY STATES — REGULATION OF RATES ON INTERSTATE FERRIES. — A New Jersey statute of 1799 empowers the boards of chosen freeholders to fix rates to be taken at ferry stations within their respective counties. The board of Hudson County fixed the rates to be taken by ferries plying between that county and New York City. *Held*, that the rates so fixed are valid. *New York Cent. & H. R. Co. v. Board of Chosen Freeholders*, 74 Atl. 954 (N. J., Ct. Err. & App.).

From a time antedating the Revolution, states have exercised the power of regulating ferries, and no exception has been made in the case of interstate ferries. When the power came to be contested under the federal Constitution, the states held that they had only potentially ceded their jurisdiction to Congress and could therefore continue to exercise it until Congress intervened. *The People v. Babcock*, 11 Wend. (N. Y.) 587; *Freeholders of Hudson Co. v. State*, 24 N. J. L. 718. The Supreme Court in several cases adopted the same view. *Fanning v. Gregoire*, 16 How. (U. S.) 524; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365. Later federal cases, however, have encroached upon this doctrine. A state cannot regulate tolls over an interstate bridge. *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204. Nor can a state regulate an interstate ferry for railroad cars which is not a ferry in the technical historic sense. *St. Clair County v. Interstate Transfer Co.*, 192 U. S. 454. When called upon, the Supreme Court may regard their earlier cases as overruled, but in view of the historic usage, the principal case wisely determined to adhere to the established principle until the Supreme Court should pass upon it directly. The need of some regulation respecting carriers of such general utility and the difficulty of any uniform regulation by Congress argue potently in favor of the established rule.

JUDGMENTS — EQUITABLE RELIEF — DEFAULT DUE TO ILLNESS OF COUNSEL. — In a petition for an injunction to restrain the enforcement of a judgment, the petitioner alleged that he had a complete defense to the action at law, but that his attorney was incapacitated for professional work by sudden illness, that he

was ignorant of this illness and out of the jurisdiction on business when the judgment by default was given, and that he did not learn of it in time to open the default. *Held*, that the petition is not demurrable. *Howell v. Ware & Harper*, 66 S. E. 884 (Ga., Sup. Ct.).

Equity will not enjoin the enforcement of a judgment, unless there is a defense not available at law, or unless the judgment was obtained by fraud, surprise, or accident. See *Kersey v. Rash*, 3 Del. Ch. 321. Absence of counsel, making unavailable a meritorious defense, is, however, a recognized ground for equitable jurisdiction. *MacCall v. Looney*, 96 N. W. 238 (Neb.). But the client must have been free from negligence. *Shields v. McClung*, 6 W. Va. 79. So if other competent counsel might have been employed, equity will not intervene. *Crim v. Handley*, 94 U. S. 652. Moreover, any laches of counsel is chargeable to the client. *Jones v. Leech*, 46 Ia. 186. *Contra*, *Gideon v. Dwyer*, 17 N. Y. Misc. 233. Hence if the defense had not been made ready for presentation, or if the absence was due to negligence or if there was another, though inferior, attorney of record in the case, equity refuses to give relief. *Mock v. Cundiff*, 6 Port. (Ala.) 24; *Belloq & Ostheimer v. Allen*, 2 McGloin (La.) 66; *Powell v. Stewart*, 17 Ala. 719. Mistake, however, may be a cause for equity to interfere. *Weed v. Hunt*, 76 Vt. 212. And sudden illness is clearly a sufficient excuse for failure to appear. *Hiller & Co. v. Cotton & Co.*, 48 Miss. 593. Since the accident in the principal case was unaccompanied by any fault on the part of counsel or client, there is a proper basis for equitable jurisdiction. See 22 HARV. L. REV. 600.

JUDGMENTS — EQUITABLE RELIEF — FALSE RETURN OF SERVICE IN MECHANICS' LIEN PROCEEDINGS. — Judgment was rendered by default in an action to foreclose a mechanic's lien, and the property sold to A, the lienholder. Although the constable's return showed that process had been duly served on B, the owner, B brought a bill in equity against A to compel a reconveyance, alleging that he had not been served with notice of the proceedings, and that A had no rightful claim. *Held*, that A must open his common-law judgment and permit B to defend. *Mierke v. Sebecke*, 74 Atl. 977 (N. J., Ct. Ch.).

Equity will relieve against a judgment at law obtained without due service of process, if it appears that a good defense would have been available. See *Crafts v. Dexter*, 8 Ala. 767; *Jeffery v. Fitch*, 46 Conn. 601. The better rule, followed in most jurisdictions, is that the officer's return is not conclusive of due service, but may be rebutted even in the absence of fraud on the part of the former plaintiff. *Owens v. Ranstead*, 22 Ill. 161; *Ridgeway v. Bank of Tennessee*, 11 Humph. (Tenn.) 523. *Contra*, *Taylor v. Lewis*, 2 J. J. Marsh. (Ky.) 400. There is no reason against applying the same rule to a judgment in a mechanics' lien proceeding. Such a judgment is frequently said to be *in rem*. See *Porter & Co. v. Miles*, 67 Ala. 130, 133. In one sense, this is true, since the judgment is directed against the property and declares the existence of a lien thereon. But it is not binding upon the whole world. *McKim v. Mason*, 3 Md. Ch. 186. If the owner of the land is not made a party and served with process, his rights are not concluded by the judgment. *McCoy v. Quick*, 30 Wis. 521, 527; *Burnham v. Raymond*, 64 N. Y. App. Div. 596; *White v. Chaffin*, 32 Ark. 59. The New Jersey statute requires mortgagees also to be joined. GEN. STAT. N. J., TIT. MECHANICS' LIEN, § 34. Cf. *Fleming v. Prudential Insurance Co. of America*, 19 Colo. App. 126. Even if the judgment were strictly *in rem*, constructive notice to the world by publication would have been necessary. *McKim v. Mason*, *supra*; *Martin v. Darling*, 78 Me. 78; *Woodruff v. Taylor*, 20 Vt. 65, 76.

LEGACIES AND DEVISES — PARTICULAR INSTANCES OF CONSTRUCTION — ABSOLUTE GIFT FOLLOWED BY QUALIFYING CLAUSES. — A testator left his residuary property on trust for all his children who should be living at his death and reach twenty-one years, as tenants in common. There was a later proviso that



the shares of married daughters were to be held on the trusts of the settlements made by the testator upon their marriages. In the marriage settlement of A, a daughter who had reached twenty-one, the ultimate trust in default of her issue was to the testator. On A's death without issue, the residuary legatee under the testator's will claimed A's share under the will as being undisposed of. *Held*, that as the gift to A was absolute, her personal representatives are entitled on the failure of the trust to the testator. *In re Currie's Settlement*, 45 L. J. 53 (Eng., Ch. D., Jan. 14, 1910).

When an absolute legacy has subsequent limitations engrafted upon it, on the failure of such qualifications the absolute gift prevails. *Hancock v. Watson*, [1902] A. C. 14; *Sears v. Putnam*, 102 Mass. 5. But when the first gift is not absolute, a failure of any modifying clause throws that part of the legacy into the residue as undisposed of. *Lassence v. Tierney*, 1 Macn. & G. 551; *Re Richards*, 50 L. T. R. N. S. 22. In England, the cause of failure is immaterial — whether through remoteness, lapse, or the non-happening of an event. *Hancock v. Watson*, *supra*; *Mayer v. Townsend*, 3 Beav. 443. In this country, however, the rule seems confined to provisions void for perpetuity. *Graham v. Whitridge*, 99 Md. 248, 277; *Sears v. Putnam*, *supra*. Though the restrictions are usually in the same instrument, the rule is also followed when an absolute gift in a will is qualified by a subsequent codicil. *Norman v. Kynaston*, 3 De G., F. & J. 20; *The Security Co. v. Snow*, 70 Conn. 288. And the same principle is applied in the execution of powers where an absolute appointment is followed by limitations in excess of the power or void for perpetuity. *Churchill v. Churchill*, L. R. 5 Eq. 44; *Cooke v. Cooke*, 38 Ch. D. 202. The only difficulty is raised by the question of construction whether or not the first gift is absolute. If the words used are ambiguous, the testator's intent is to be gathered from the whole will; but once an absolute gift is spelled out, it remains unaffected by later expressions. *Lassence v. Tierney*, *supra*; *Hancock v. Watson*, *supra*.

**LIBEL AND SLANDER — PLEADING AND PROOF — LIBEL WITHOUT INTENT.** — A newspaper published an imaginary account of a supposedly fictitious character. The name used was that of the plaintiff, a prominent barrister of the locality, whose friends reasonably believed that he was the person referred to. The defendant did not intend to refer to the plaintiff, and had no intention of libelling any one. The plaintiff brought action for libel. *Held*, that he can recover. *Jones v. Hutton & Co.*, [1910] 1 A. C. 20. This case affirms the decision of the lower court commented on in 23 HARV. L. REV. 218.

**MUNICIPAL CORPORATIONS — POLICE POWER AND REGULATIONS — ACTS PROHIBITED BY BOTH STATUTE AND ORDINANCE.** — By its charter a city was given authority to make ordinances in the exercise of the police power. An ordinance was passed penalizing the sale or possession of cocaine. A state law, already in existence, imposed a smaller penalty for the sale of cocaine. *Held*, that there can be a conviction under the ordinance for the sale of cocaine. *Rossberg v. State*, 74 Atl. 581 (Md.).

When given authority by the legislature, a municipality can enact ordinances in the exercise of the police power. *Shafer v. Mumma*, 17 Md. 331. But regulations inconsistent with the general law of the state are void. *Hofmayer v. City of Blakely*, 116 Ga. 777. In applying this doctrine, text-writers, as well as courts, have adopted diverse rules. See McQUILLIN, MUN. ORD., 783 *et seq.*; DILLON, MUN. CORP., 4 ed., 436; BEACH, PUB. CORP., 516 *et seq.* The view has been taken that an ordinance prohibiting an act criminal by statute or common law, is repugnant to the general law of the state, on the ground that it subjects an offender to double jeopardy or else deprives the state of jurisdiction. See *City of New York v. Alhambra Theater*, 118 N. Y. Supp. 471; *Southport v. Ogden*, 23 Conn. 128. Some states reject ordinances imposing a penalty or covering a scope

different from that of the statute. See *State v. Langston*, 88 N. C. 692; *Town of Petersburg v. Metzker*, 21 Ill. 205. And some regard a substantial duplication of a statute as bad. See *State v. McCoy*, 116 N. C. 1059; *In re Sic*, 73 Cal. 142. All of these notions seem ill-founded, for as a crime is the transgression of a law, it is conceivable that the same act should constitute two offenses, one against the state and another against the municipality. See *Moore v. People*, 14 How. (U. S.) 13; *Mayor v. Allaire*, 14 Ala. 400. But see *In re Sic*, *supra*. And the weight of authority is clearly in accord with the principal case. *City of New York v. Marco*, 109 N. Y. Supp. 58; *State v. Ludwig*, 21 Minn. 202.

**PARTNERSHIP — RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS INTER SE — ACTION ON NOTE AFTER DISSOLUTION OF FIRM.** — A partnership advanced to the defendant, one of the partners, money in excess of his share of the profits. For the excess, the defendant gave a four months' note to the firm's order. Thereafter he sold his interest in the partnership to a copartner. Later the firm assigned all its assets to a trustee in liquidation. There had been no settlement between the partners within six months prior to the time when the note was given. *Held*, that the trustee cannot recover on the note at law. *Summerson v. Donovan*, 66 S. E. 822 (Va.).

As a general rule, members of a partnership cannot recover from one another at law on partnership claims, until there has been a final settlement. *Sadler v. Nixon*, 5 B. & A. 936; *Crow v. Green*, 111 Pa. St. 637. But *cf. Wilby v. Phinney*, 15 Mass. 116. For the law cannot well handle matters of account, and the defendant's share in the firm's surplus may be more than sufficient to exhaust any particular claim against him. See *Ivy v. Walker*, 58 Miss. 253. But *cf. Bennett v. Smith*, 40 Mich. 211. And this reason holds, even if the defendant has withdrawn from the firm, or it has been dissolved. *Burley v. Harris*, 8 N. H. 233; *Lang v. Oppenheim*, 96 Ind. 47. But if a partner makes with his copartners an express contract isolated from the regular course of the partnership business, he is liable on it at law. *Pardee v. Markle*, 111 Pa. St. 548; *Fox v. Frith*, 10 M. & W. 131. It would seem that setting a definite time to pay a note implies a promise to pay without going into an accounting: indeed, it has been said that such a promise should be implied merely from a partner's taking a loan. See *Bank of British North America v. Delafield*, 126 N. Y. 410, 415; LINDLEY, PARTNERSHIP, 7 ed., 596. But each case must depend on its own circumstances, and as the court in the principal case assumes that the note was a mere item in the partnership account, its decision is sound. See *Robson v. Curtis*, 1 Stark. 78; *Simrall v. O'Bannons*, 7 B. Mon. (Ky.) 608.

**POLICE POWER — NATURE AND EXTENT — POLICE POWER OF THE STATES AND THE FEDERAL POWER OF TAXATION.** — A statute in North Dakota provides that every person to whom a federal license is issued must publish notice of the same for three weeks in the newspapers, and after such period keep posted, along with the government tax receipt, an affidavit of the fact of publication and the obtaining of such license; and further, a duly authenticated copy of the tax receipt is required to be filed with a certain state officer whose duty it is to publish monthly lists of such licenses. *Held*, that the statute is unconstitutional as an unreasonable burden on the federal power of taxation. *State of North Dakota v. Hanson*, 30 Sup. Ct. 179. See NOTES, p. 465.

**PROCESS — MANNER AND EFFECT OF SERVICE — PRIVILEGE OF NON-RESIDENT PARTIES AND WITNESSES.** — A non-resident out on bail pending trial on a criminal charge returned to the jurisdiction for trial. Immediately after acquittal he was served with summons in a civil suit having no connection with the former charge. *Held*, that he is not privileged from service of process. *Netrograph Mfg. Co. v. Scrugham*, 197 N. Y. 377. See NOTES, p. 474.



PROCESS — MANNER AND EFFECT OF SERVICE — PRIVILEGE OF NON-RESIDENT PARTIES AND WITNESSES. — A non-resident came voluntarily into the jurisdiction to testify in a civil suit, and while there was served with summons. *Held*, that he is privileged from service of process. *Chittenden v. Carter*, 74 Atl. 884 (Conn.). See NOTES, p. 474.

RECEIVERS — LIABILITY FOR RAILROAD'S TORT COMMITTED BEFORE APPOINTMENT. — A court appointed a receiver to preserve the property of a railroad during litigation. He was sued for damages resulting from an injury sustained before the railroad passed into his possession. *Held*, that he is not liable. *Fountain v. Stickney*, 123 N. W. 947 (Ia.).

A receiver authorized by statute to be appointed to wind up a corporation succeeds to all the company's liabilities; for discharging obligations is a necessary step in winding up. *Pickersgill v. Myers & The Lycoming Fire Insurance Co.*, 99 Pa. St. 602. But the appointment by a court of equity of a receiver to hold and manage corporate property during litigation does not dissolve the corporation. *State ex rel. Attorney-General v. Merchant*, 37 Oh. St. 251. The property of the corporation is simply in the custody of the court of which the receiver is an officer. *Memphis & C. R. Co. v. Hoechner*, 67 Fed. 456. Since the receiver is to operate the business, it is proper that he should be liable for torts committed in the course of his operation. *Little v. Dusenberry*, 46 N. J. L. 614. *Cf. Texas & Pacific Ry. Co. v. Geiger*, 79 Tex. 13. And a change of receivers does not affect the cause of action, for it is against the fund in court or against the receiver in his official rather than his personal capacity. *McNulta v. Lockridge*, 141 U. S. 327. But since the object of the receivership is the most profitable management of the business, the receiver need not perform contracts previously made by the corporation. *Quincy, Missouri, & Pacific Railroad Co. v. Humphreys*, 145 U. S. 82. For the same reason the principal case properly holds that he need not make compensation for its previous torts. *Northern Pacific Ry. Co. v. Heflin*, 83 Fed. 93.

RULE IN SHELLEY'S CASE — EXECUTORY TRUSTS. — A deed of land was made to X in fee in trust for the use of A for life, and at his death to convey to such person or persons as A might by his will direct, or in default of such direction to the heirs of A in fee. A made a conveyance of the land to the defendants in fee, and later died intestate. The defendants claimed that this conveyance was valid under the rule in Shelley's Case. *Held*, that the rule is not applicable. *Steele v. Smith*, 66 S. E. 200 (S. C.).

The rule in Shelley's Case does not apply to executory trusts. *Papillon v. Voice*, 2 P. Wms. 470; *Berry v. Williamson*, 11 B. Mon. (Ky.) 245, 265. An executory trust is one whose limitations are not completely declared but are to be determined by the trustee with the aid of the court according to the creator's apparent intention. *Jervoise v. The Duke of Northumberland*, 1 Jac. & W. 559, 570; *Cushing v. Blake*, 30 N. J. Eq. 689. Though of more frequent occurrence in English marriage settlements and wills, they are also known in this country. *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543; *Nicoll v. Ogden*, 29 Ill. 323, 384. An executory trust of this kind must be carefully distinguished from a trust executory in the sense of not executed by the statute of uses. See *Estate of Fair*, 132 Cal. 523, 568. This distinction is vital in avoiding confusion with the equally well settled principle that for the rule in Shelley's Case to operate the two estates must be of the same quality. *Jones v. Lord Say & Seal*, 8 Vin. Abr. 262; *Griffith v. Plummer*, 32 Md. 74. Where the trusts are perfectly declared, a mere direction to convey will not make the trust executory in the strict sense. *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1, 210; *Cushing v. Blake*, *supra*. But, by the better authority, the duty to convey prevents the trust from being executed by the statute. *Ayer v. Ritter*, 29 S. C. 135. *Contra*,

*Bacon's Appeal*, 57 Pa. St. 504. In the present case, there was no strict executory trust. But since the particular estate was legal and the remainder unexecuted and equitable, the court rightly held that the rule in *Shelley's Case* was inapplicable.

**STATUTE OF FRAUDS — PART PERFORMANCE — PAROL PARTITION OF LAND.** — In an action of ejectment, the defendant offered to show that one of his predecessors in title had been in adverse possession of the land, under a parol partition between tenants in common, for more than the statutory period of limitation. *Held*, that the evidence should have been admitted. *Oliver v. Williams*, 50 So. 937 (Ala.).

A parol partition between tenants in common executed in severalty with livery was good at common law. See Co. LIT. 169 *a*. Jurisdictions differ as to whether a parol partition is within the Statute of Frauds. Most statutes expressly cover such a transaction. *Porter v. Perkins*, 5 Mass. 233. *Cf. Johnson v. Wilson*, Willes, 248. *Contra, McKnight v. Bell*, 135 Pa. St. 358. Possession in severalty, however, especially if continued for some time and if improvements be made, takes the case out of the statute. One ground for this result is that part performance gives an equitable title in severalty, as in the case of a contract for the sale of land. *Welchel v. Thompson*, 39 Ga. 559. Another basis of the rule is that the parties to the partition are estopped to attack it. *Berry v. Searwall*, 65 Fed. 742. *Cf. Le Bourgeoise v. Blank*, 8 Mo. App. 434. And for this reason one jurisdiction which repudiates the doctrine of part performance as applied to sales of land upholds a parol partition. *Pipes v. Buckner*, 51 Miss. 848. Moreover, the partition may be confirmed by decree of equity. *Hazen v. Barnett*, 50 Mo. 506. Or possession for the period of the Statute of Limitations may give legal title. *John v. Sabattis*, 69 Me. 473; *Slone v. Grider*, 19 Ky. L. Rep. 1698. And since in the principal case there was adverse possession in severalty for the statutory period, the decision is clearly correct.

**STATUTE OF FRAUDS — SALES OF GOODS, WARES, AND MERCHANDISE — CONTRACT FOR GOODS TO BE MANUFACTURED.** — An action was brought on an oral contract for the manufacture and delivery of a quantity of oil cases. *Held*, that a contract for the sale of goods already existing, or such as the vendor ordinarily produces for the general market, whether on hand at the time or not, is within the Statute of Frauds; but if the goods are to be manufactured upon a special order, the contract is not one for the sale of goods. *Courtney v. Bridal Veil Box Factory*, 105 Pac. 896 (Ore.).

There are three conflicting rules, defining a contract for the sale of goods as distinguished from a contract for work and labor. The English rule is that if the contract will result in a sale of goods, either presently existing or to be manufactured, the statute applies. *Lee v. Griffin*, 1 B. & S. 272; *Isaacs v. Hardy*, 1 Cab. & E. 287. But *cf. Clay v. Yates*, 1 H. & N. 73. In this country, what is commonly called the New York rule is that when the goods are to be manufactured the statute does not apply. *Crookshank v. Burrell*, 18 Johns. (N. Y.) 58; *Winship & Co. v. Buzzard*, 9 Rich. Law (S. C.) 103. *Cf. Bagby v. Walker*, 78 Md. 239; *Cooke v. Millard*, 65 N. Y. 352, 361. The Massachusetts rule, followed in the principal case, and embodied in the Uniform Sales Act, avoids both extremes. *Mixer v. Howarth*, 21 Pick. (Mass.) 205; *Finnney v. Apgar*, 31 N. J. L. 266. See WILLISTON, SALES, § 52. *Cf. Garbutt v. Watson*, 5 B. & Ald. 613. Since the statute applies equally to executed and executory contracts, the mere fact that the goods are not yet in existence, or that labor must be expended on them, should not affect its applicability. The English rule, distinguishing between a contract essentially for a chattel and one essentially for labor, is to be preferred on principle. But the Massachusetts rule, laying down a working criterion by which the essence of the contract is to be determined, has practical advantages. But see *Pitkin v. Noyes*, 48 N. H. 294, 302.



TRESPASS TO REALTY — WHAT CONSTITUTES A TRESPASS — COMPENSATION FOR TRESPASS JUSTIFIED BY NECESSITY. — The defendant's vessel was rightfully moored at the plaintiff's wharf when a storm arose. To save the vessel, the captain tied her fast to the wharf and kept her so throughout the storm, as prudence and good seamanship required. The wharf was damaged by the grinding of the vessel. *Held*, that the defendant must compensate the plaintiff for the loss inflicted. *Vincent et al. v. Lake Erie Transportation Co.*, 124 N. W. 221 (Minn.).

Necessity either public or private will, in some cases, justify a trespass to realty. Saving property from loss by fire or water is such a justifying private necessity. See 22 HARV. L. REV. 296; *Proctor v. Adams*, 113 Mass. 376. Thus the trespass in the principal case is justified. But a recent English case would seem to leave the loss where it falls, thereby allowing one man for his own benefit deliberately to thrust a burden upon another. See *Cope v. Sharpe*, 26 T. L. R. 172 (Eng., K. B. D., Dec. 15, 1909). This has seemed unjust to several text-writers who suggest that, although the trespass should be justified, yet the owner should be compensated for the loss occasioned by his being forced by law to become the means of saving another from a greater loss. See 3 HARV. L. REV. 204; TERRY, PRINCIPLES OF ANGLO-AMERICAN LAW, 422-423; HOLMES, COMMON LAW, 148. Cf. *Ploof v. Putnam*, 71 Atl. 188 (Vt.). If the law will not allow a man to refuse the use of his property to a needy man, it should not allow the latter to benefit himself at the former's expense. The law should look on the matter as a judicial sale of the use of land and give the owner a remedy upon a theory analogous to quasi-contract. This is the just balancing of legal rights achieved by the Minnesota court.

VENDOR AND PURCHASER — RIGHTS AND LIABILITIES — RISK OF LOSS IN EXECUTORY CONTRACT FOR SALE OF LAND. — After an executory contract for the sale of land, a house on the premises was burned without fault of either party. The title had been arranged, a deed executed but not delivered, and the purchaser was in possession. *Held*, that the loss must fall on the purchaser. *Sewell v. Underhill*, 197 N. Y. 168. See NOTES, p. 476.

WILLS — PROBATE — ORIGINAL PROBATE OF FOREIGN WILL. — A testatrix died domiciled in New York, where she had resided for sixty years, leaving by her will real estate situated in New York and the greater part of her personalty in Massachusetts. Before admission to probate in New York, though proceedings were there pending, the original will was offered and admitted to probate in Massachusetts against the objections of the heirs at law. *Held*, that the admission to probate was erroneous. *Rackemann v. Taylor*, 90 N. E. 552 (Mass.). See NOTES, p. 467.

WILLS — PROBATE — ORIGINAL PROBATE OF FOREIGN WILL. — A testator died domiciled in England, leaving two separate and independent wills, one disposing of his entire English property and the other of his property real and personal situated in Kansas. The English will was alone probated in England, while the original American will was brought to Kansas and there presented for probate. *Held*, that probate should be granted. *Thompson v. Parnell*, 105 Pac. 502 (Kan.). See NOTES, p. 467.

## BOOK REVIEWS.

NOTES ON MASSACHUSETTS PRACTICE WITH REFERENCE TO PROCEEDINGS BEFORE MASTERS AND AUDITORS. By Frank Paul. Boston: Little, Brown, and Company. 1909. pp. xvi, 234.

This book is a work invaluable in its special field. It is perhaps to be expected that, dealing with such a subject, it should be so arranged that all the points on one part of the subject should be grouped together and that it should be so indexed that any one point might readily be discovered. The law of procedure is easily analyzed. But it does not offer an inspiring field for careful argument. We are pleasantly surprised therefore to find in this book new points of practical importance raised, conflicting authorities carefully compared, analogous decisions and statutes discussed and, when necessary, the course of development of statutes traced, as if a principle of substantive jurisprudence were in question. Furthermore, whether in considering a new point or a point of conflict the author has not hesitated to state his conclusion, with his reasons for it, thereby giving the reader who will agree with him the benefit of the opinion of one who has studied the whole field, and showing the reader who will disagree with him some points which must be overcome. The book promises to be one to which the practitioner may turn and find his point treated, not missed — a high recommendation when the subject includes the many worrying little details of practice.

P. K.

THE HOUSE OF LORDS ON THE LAW OF TRESPASS TO REALTY AND CHILDREN AS TRESPASSERS. By Thomas Beven. London: Stevens and Haynes. 1909. pp. 48.

The legal profession are indebted to a recent decision of the House of Lords,<sup>1</sup> for this interesting and instructive pamphlet. That decision goes far towards committing the courts of last resort in Britain to the doctrine, approved by our Federal court of last resort, in *Railroad Company v. Stout* (1873), 17 Wall. 657. In each case, the plaintiff was a child of tender years (four years and six years respectively), who was injured while playing with a turn-table on the defendant's land, at some distance from the highway. Of course, neither turn-table was placed on its land by the defendant, with a view of alluring children to use it as a plaything, but solely for its lawful business as a railroad company. The machinery was not in, or immediately adjoining, a highway, nor was either plaintiff rightfully upon defendant's premises, when injured. Nor had such plaintiff an express license from the defendant to be upon its land, and the only implication of license seems to be found in the facts, that defendant knew or had reason to believe that children would enter upon its land for the purpose of playing with the turn-table, and did not take effective measures to prevent them from so trespassing. In each case, it is declared to be a question for the jury, whether the defendant was guilty of actionable negligence towards the child.

Sir Frederick Pollock has expressed the opinion that all the Lords decided in the Cooke Case "is that licensees known to the licensor to be, by no fault of their own, incapable of exercising the caution of a normal man are entitled to a measure of special care in proportion to their imbecility." In his judgment, the rule of law laid down is one of narrowly limited extent, though he admits "some persons may be encouraged to bring speculative and fruitless actions," because

<sup>1</sup> *Cooke v. Midland G. W. Ry. Co.*, [1909] A. C. 229, 78 L. J. C. P. 76, reversing S. C. in [1908] 2 Ir. 242.



they "think the decision goes further than it really does."<sup>1</sup> Mr. Beven declares that such actions have been started. This knowledge on his part, and his belief that such actions will lead to the "payment of hundreds of pounds as black-mail," appear to have aroused him to the publication of this pamphlet.

We have spoken of it as interesting and instructive. No lawyer, we are sure, who begins its perusal will lay it aside unfinished. Its style is particularly clear and trenchant, while its criticism of the various judgments of the learned Law Lords is searching and fearless. Possibly his comments on Lord Atkinson's "involved and difficult" judgment are too severe, but it cannot be doubted that he expresses accurately the feeling of most persons who have read this judicial deliverance, when he says: "Readers of this and much more like it to be found in the report must feel a very similar admiration to that which Plato in the Euthydemus represents Socrates to express when he found himself the sport of those nimble and elusive word-fencers Euthydemus and Dionysodorus."

The pamphlet is instructive, by reason of its careful and thorough analysis of preceding English decisions, bearing upon the point involved, and its statement of the legal principles applicable to the facts of this case. Our author contents himself with a brief reference to American cases upon this topic, and refers his readers to "two admirable articles in the HARVARD LAW REVIEW,"<sup>2</sup> by Professor Jeremiah Smith, who arrives at conclusions similar to those presented here." Those articles, Mr. Beven can be assured, have exercised a wholesome influence over later decisions in this country.<sup>3</sup> It is to be hoped that his pamphlet may produce a like effect in England.<sup>4</sup>

F. M. B.

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THE EFFECT OF WAR ON CONTRACTS AND ON TRADING ASSOCIATIONS IN TERRITORIES OF BELLIGERENTS. By Coleman Phillipson. London: Stevens and Haynes. 1909. pp. 114.

This brief, well written essay, covering both common law and continental rulings, won the Quain Prize in the Department of Comparative Law at University College, London, 1908. Our only general criticism is that we feel it probable that the author might have found additional light, or at least a few more citations of especial interest to American readers, had he had access to a greater number of decisions of American courts. As a whole, however, the work is commendable, both from the book-writing and the book-publishing standpoints.

The author's idea that the nationality of a corporation depends on its place of charter; its domicile, on its principal place of business, seems eminently sound. But not so his statement that theoretically war will destroy the rights of a shareholder in an enemy corporation, since the right is technically a contractual one, and executory. Though it is technically contractual, — or is at least a *chose in action*, it does not seem executory in the sense that war would destroy it. The right to participate in the management of the company might cease during war, but it is believed that all other rights and obligations should, as in the case of an ordinary contract debt, continue in existence during the war and become enforceable at its end. At the worst, it seems to the reviewer that the shareholder should, if his rights in his shares are destroyed, recover at the end of the war an

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<sup>1</sup> Notes, 25 Law Quarterly Rev. 229.

<sup>2</sup> Vol. XI, pp. 349, 434.

<sup>3</sup> See *Savanah, F. & W. Ry. v. Beavers*, [1901] 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314, commending these articles and avowing the intention to limit the turn-table cases doctrine. A group of cases in 19 L. R. A., N. S., pp. 1095-1173, and the extensive note thereto, show a similar tendency on the part of other courts to limit or repudiate the "attraction nuisance" theory.

<sup>4</sup> *Lowery v. Walker*, [1909] 2 K. B. 433, 78 L. J. K. B. 874, affords some justification for this hope.

amount equal to the value of the shares at the beginning of the war. Such a result was reached in the United States Supreme Court in the case of a life insurance policy. *New York Life Insurance Company v. Statham*, 93 U. S. 24; *New York Life Insurance Company v. Davis*, 95 U. S. 425. The author concludes that the correct theory, as he regards it, should be ignored, and the rights of the stockholder preserved. This whole subject presents many interesting questions, which, after all, we hope may never be determined.

A. R. G.

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THE LAW OF THE UNIVERSITIES. By James Williams. London: Butterworth and Company. 1910. pp. xviii, 151.

This book attempts to collect between its two covers all the law relating to Oxford and Cambridge Universities under chapters on Prerogative and Legislation, Visitation, Government, Discipline, Education, Finance, Privilege, Courts, and Miscellaneous. The shortness of the space, five pages, devoted to Education is a fair indication of the point of view, which is legal rather than educational. Owing to the peculiar historical development of these two great English Universities, the book, with the exception of a short consideration of law of infancy, pages 108-113, is of only academic value to lawyers and university officers in America. For us perhaps the most interesting chapters are those on Government, Finance, Discipline, and Courts. The government of these ancient universities mainly depends, oddly enough, on three acts passed in 1854, 1856, and 1877, statutes relatively modern when compared with the charter of Harvard (1650), under which the governing boards here are still acting. While Oxford and Cambridge enjoy extended exemptions from taxes and rates (pp. 72-75), one is surprised to find this immunity by no means as far-reaching as in some of our states. Very little public money, too, is paid to Oxford and Cambridge. Most of it goes to younger universities. The power of officers of the university over disreputable non-members, over places of amusement, and over citizens, and their strange right of forbidding a railway company to carry certain unfortunate undergraduates, are striking. These, and the existence of the University courts, are to us perhaps the most curious portions of the subject. The courts of each university have jurisdiction over members. The Oxford court has some jurisdiction over non-members when a student is a party, and an appeal lies to the Supreme Court of Judicature. The jurisdiction of the Cambridge court is narrower. It is but slightly extended over outsiders, and no appeal lies to the High Court. It is difficult to state whether the research in so highly technical a field has been exhaustive. One can at least say that, except in the consideration of the American cases (pp. 137-139), it has every appearance of care and thoroughness.

J. W.

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A BRIEF HISTORY OF THE MIDDLE TEMPLE. By C. E. A. Bedwell. London: Butterworth and Company. 1909. pp. vi, 132.

This little book is composed largely of matter which the author has already published in legal magazines concerning the Middle Temple, and does not purport to be a "systematic history" of the Inn. It is, in fact, a brief sketch of the origin of the Inns of Court with their division into the two temples and a short account of the Middle Temple during and after the Restoration and in the eighteenth century. Chapters are also given to its library and to some of its distinguished members. Of especial interest to Americans are those chapters relating to the early history of this country and the influence of those members of the Middle Temple who were connected with the early enterprises looking towards the establishment of the American Colonies.

J. S. S.



- LEGAL MEDICINE. By Gilbert H. Stewart. Indianapolis: The Bobbs-Merrill Company. 1910. pp. xvi, 506.
- REPORT OF THE ATLANTIC CITY CONFERENCE OF JULY, 1909, ON WORKMEN'S COMPENSATION ACTS. Minneapolis. 1909. pp. 319.
- THE CIVIL CODE OF THE GERMAN EMPIRE. Translated by Walter Loewy. Boston: The Boston Book Company. 1909. pp. lxxi, 689.
- A TREATISE ON THE LAW OF FIDELITY BONDS. By M. Barratt Walker. Baltimore: King Brothers. 1909. pp. xv, 303.
- SHIPPERS AND CARRIERS OF INTERSTATE FREIGHT. By Edgar Watkins. Chicago: T. H. Flood and Company. 1909. pp. 578.
- DAY IN COURT, or The Subtle Arts of Great Advocates. By Francis L. Wellman. New York: The Macmillan Company. 1910. pp. 257.
- PRECEDENTS OF PLEADING AT COMMON LAW. By Charles A. Keigwin. Washington: John Byrne and Company. 1910. pp. xxx, 607.
- THE LAW OF SPECIFIC RELIEF IN BRITISH INDIA. By Satish Chandra Bauerji. Calcutta: R. Cambray and Company. pp. clxxi, 838, 336.

# HARVARD LAW REVIEW.

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VOL. XXIII.

MAY, 1910.

NO. 7.

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## EXECUTED ULTRA VIRES TRANSACTIONS.

THE sovereign charters a corporation, M. Its "powers" are defined. The natural persons incorporated assume, in the name of M, to do an act not within the scope of the "powers." What is the legal effect?

The law relating to *ultra vires* transactions presents three principal questions: (1) Shall an executed transaction be a foundation of rights and obligations? (2) Shall an executory transaction be a foundation of rights and obligations? (3) Shall an executed transaction be set aside? This article deals only with the first of these questions.

A corporation is a composite unit. The human mind readily conceives the notion of many persons forming a unit. Is this a fiction? The human mind conceives of a river as forming a unit, not simply as so many drops of water. It conceives of an army as forming a unit, not simply as so many soldiers. In this there seems to be no fiction, — no make-believe.

The conception of many human beings as one is not necessarily the conception of many human beings as one human being. A human being is a unit, but there are many units which are not human beings. Suppose the conception were of many human beings as one human being. Would this be a fiction? It seems to me that it clearly would. Suppose the conception were of many human beings as a unit, and that this unit had a mind and will of its own, similar to the mind and will of a human being. Would this be a fiction?

It may be said that there is no more difficulty in conceiving of many minds as forming a composite unit, in the way of minds, than



there is in conceiving of many bodies as forming a composite unit, in the way of bodies. It is a problem which goes beyond the law into philosophy, and beyond philosophy into religion. Many persons conceive of God as the sum of all consciousness, — that is, as a composite unit made up of all existing consciousnesses.

If to conceive that the unit has a mind and will of its own similar to the mind and will of a human being is not a fiction, then the reasoning of this article is, *a fortiori*, sound. I will therefore assume that it is a fiction, — a make-believe.

It is a popular make-believe, rather than a legal make-believe. It is to be found in the earliest and rudest literatures. The judges did not originate it. In ascribing to a corporation a mind and will similar to the mind and will of a human being, and in giving it rights and duties similar to the rights and duties of a human being, the law simply adopts and uses a convenient popular fiction.

Many human beings may act as though they formed a unit with a mind and will of its own. This is corporate action.

Suppose the sovereign authorizes them so to act. Just what is the effect of this authority? It does not affect the fiction at all. It does not originate the fiction. It does not make the fiction either greater or less. *It is equivalent to a direction to the judges to act upon the fiction in the specified case.* But the judges might have acted upon the fiction without any such direction. And — if they think it proper — they may to-day act upon the fiction without any such direction.

The law in early times recognized that there could be corporate action without the authority of the sovereign, and gave legal validity to such corporate action.<sup>1</sup>

Corporate action unsanctioned by the sovereign is as real as corporate action sanctioned by the sovereign. Unauthorized corporate action is as real as authorized corporate action. The question becomes: Is it ever proper for the judges to act upon the fiction in the absence of a direction from the sovereign, — is it ever proper for the judges to give legal validity to unauthorized corporate action?

Lord Coke seems to have conceived that there *could* be no corporate action except by the consent of the sovereign. The charter worked legal magic. It called forth a legal spook. The spook could not pass beyond the bounds laid down in the charter. Unauthorized

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<sup>1</sup> See 21 HARV. L. REV. 308, and notes 1 and 2 appended to the text.

corporate action was, to Coke, unthinkable, — it was a contradiction in terms.<sup>1</sup>

If this view is taken, then, whenever natural persons who have been incorporated assume, in the name of the corporation, to do an act *ultra vires* of the corporation, the courts *cannot* give effect to the act, as the act of the corporation.

In *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, the court, speaking by Mr. Justice Gray, said: "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." In *California Bank v. Kennedy*, 167 U. S. 362, a certificate for shares of the stock of corporation M was issued in the name of corporation N, and dividends thereon were paid into the treasury of N. M became insolvent, and a creditor sought to enforce against N the liability attaching to shareholders in M. The court allowed N to defend, on the ground that the purchase of the shares by N was *ultra vires*. "It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified."

It is submitted that this reasoning is erroneous.

Consciously, or unconsciously, all courts to-day do treat some unauthorized corporate action as corporate action. For example: Persons have sought to become incorporated, but have failed to perform a condition precedent to incorporation. They nevertheless assume to act as a corporation. All courts, under some circumstances, treat this unauthorized corporate action as corporate action, and give legal validity to it as such.<sup>2</sup>

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<sup>1</sup> See 21 HARV. L. REV. 306, 307.

<sup>2</sup> These circumstances are stated and discussed in two articles on Collateral Attack on Incorporation in 20 HARV. L. REV. 456, and 21 HARV. L. REV. 305.



If, when the associates are not authorized to act as a corporation for any purpose, the courts can treat unauthorized corporate action as corporate action, they *can* do the same when the associates are authorized to act as a corporation for some purposes, but not for the purpose in question.

Unauthorized corporate action is legally objectionable. The sovereign may always object, and obtain relief. Assume, however, that the sovereign does not object; are the courts bound to allow private individuals to raise the point? The development of the doctrine that collateral attack on the formation of a corporation may be denied shows that the courts have not felt themselves bound to do so.

If a court may properly deny collateral attack on the formation of a corporation, it may conceivably be proper for it to deny collateral attack on the powers of a corporation which has been duly formed.

There was a time when the courts held that a corporation could not be liable for any tort, because it was not authorized to commit torts.<sup>1</sup> To-day such a doctrine is treated as absurd. May it not be equally absurd to assert that a corporation cannot be liable on a contract, because it was not authorized to make the contract?

The reasoning, given above, by Mr. Justice Gray sounds decisive and conclusive. Can these sonorous passages be taken at their ear value? It becomes profitable to review the leading cases bearing on the topic which have been decided by the United States Supreme Court itself.

*Head v. Providence Insurance Co.*, 2 Cranch 127 (1804). A contract of insurance, not executed according to the provisions of the charter of the defendant, was held not to be a corporate act. Marshall, C. J., said (p. 166): "This body . . . is the mere creature of the act to which it owes its existence. . . . The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of

<sup>1</sup> "Trespas ne git vs cominaltie s. per le nosme de corporation, mes vs les persons q. ceo fieront p. lour proper nosmes." 22 Ass. p. 67.

"Corporation ne poet estre batus in lour corporation mes in lour natural corps ne corporation ne poet bater aut ne faire treason ou felony in lour corporation." 21 Edw. IV, 72.

These authorities were followed by Coke and Blackstone. 10 Co. 32 b; 1 Bl. Comm. 476.

contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated.”<sup>1</sup>

*Pearce v. Madison Co.*, 21 Howard, 441, 444 (1858). A corporation gave notes for the purchase of property which it was not authorized to purchase, and it was allowed to defend against the endorsee of the notes. “The only question is, Had the corporation the capacity to make the contract, in the fulfillment of which they were executed?”

*National Bank v. Matthews*, 98 U. S. 621 (1878). A executed a promissory note to B, and, to secure the payment thereof, a deed of trust of lands which was in effect a mortgage with a power of sale. A national bank loaned money to B, and assumed to take an assignment of the note and deed. Making a loan on the security of real estate was *ultra vires* of the bank. The court, nevertheless, declined to enjoin the trustee from selling the lands for the benefit of the bank, saying (pp. 628–629): “Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. . . . The impending danger of a judgment of ouster and dissolution was, we think, the check and none other contemplated by Congress. That has always been the punishment prescribed for a wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government.”

*National Bank v. Case*, 99 U. S. 628 (1878). A corporation, N, assumed to take stock in a national bank, M. The receiver of M sought to charge N as a shareholder. The court held that, under the circumstances, the transaction was not *ultra vires*. “But if [otherwise] the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action.”

*Cowell v. Springs Co.*, 100 U. S. 55, 60 (1879). Corporation M assumed to be the owner of Blackacre, and to lease it to A upon a condition. The condition was broken, and M brought ejectment against A. A defended on the ground that ownership of Blackacre was *ultra vires* of M. The court permitted M to recover, and said that whether the holding of Blackacre was necessary to enable M to

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<sup>1</sup> See also *Bank of Augusta v. Earle*, 13 Pet. 519; *Perrine v. Chesapeake Co.*, 9 How. 172.



carry on its business was a matter "between the government of the state . . . and the corporation, and is no concern of the defendant."

*Thomas v. Railroad Co.*, 101 U. S. 71, 86 (1879). Corporation M assumed to make a lease of its property to A. This was *ultra vires* of M. The lease provided that, if M resumed possession, there should be a payment to A, to represent the value of the unexpired term. M resumed possession, and the court held that it need not pay A. "What is sought . . . is the enforcement of the unexecuted part of the agreement. . . . It is not the case of a contract fully executed. . . . We cannot see that the present case comes within the principle that requires that contracts which, though invalid for want of corporate power, have been fully executed shall remain as the foundation of rights acquired by the transaction."<sup>1</sup>

*Christian Union v. Yount*, 101 U. S. 352, 361 (1879). A assumed to deed Blackacre to corporation M (apparently without consideration). A died, and his heirs sought to recover the land. "Its acquisition of a larger quantity of real estate than the charter allowed, or its business required, or was consistent with the law of Illinois, was not a question which the appellees have any right to raise. If the title passed by valid conveyance from their ancestor, it is of no concern to them that the appellant has acquired or is holding more real estate than its charter authorizes."

*Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 628 (1879). Corporation M assumed to give a mortgage which the mortgagee sought to enforce. "If [the mortgage] be *ultra vires*, no one can take advantage of the defect of power involved" but the state. As to all other parties, it must be held valid, and may be enforced accordingly. . . . In [*National Bank v. Matthews*] this subject was fully examined."

*National Bank v. Whitney*, 103 U. S. 99 (1880). A national bank was permitted to exercise the rights of a mortgagee although its holding the mortgage was alleged to be *ultra vires*. "The question presented is not an open one in this court. It was determined in the case of *National Bank v. Matthews*. . . . Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons."<sup>2</sup>

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<sup>1</sup> See also *Oregon Railway Co. v. Oregonian Railway Co.*, 130 U. S. 1, 37.

<sup>2</sup> *National Bank v. Matthews* was also followed in *Swope v. Leffingwell*, 105 U. S. 3, and in *Fortier v. New Orleans Bank*, 112 U. S. 439, 451.

*Jones v. Habersham*, 107 U. S. 174 (1882). Corporation M was authorized to hold property "provided that the clear annual income . . . shall not exceed the sum of five thousand dollars." A assumed by his will to give M certain property, and the clear annual income of the property previously held by M and of that assumed to be given was in excess of five thousand dollars. To the attack of the heirs and next-of-kin of A the court said (p. 188): "Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state which created it."

*National Bank v. Stewart*, 107 U. S. 676 (1882). M, a national bank, assumed to make a loan which was *ultra vires*. It sold the security. The debtor was held not entitled to recover the proceeds from the bank. The court said that it was too late for any one except the government to dispute the validity of the transaction.

*Reynolds v. Crawfordsville Bank*, 112 U. S. 413 (1884). A corporation M assumed to own Blackacre, and sought to restrain waste by A, the former owner. A alleged that the ownership by M was *ultra vires*. As an additional ground for giving the desired relief, the court said: "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable; the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."<sup>1</sup>

*Salt Lake City v. Hollister*, 118 U. S. 256 (1885). The plaintiff alleged that a tax was illegally exacted from it for the distilling of spirits. The spirits were distilled by the officers of the plaintiff, and the proceeds were received into its treasury. It claimed that distilling spirits was beyond its powers, and therefore that the distilling was to be considered the act of its officers, and not of itself. The court crashed through this argument. The opinion was written by Mr. Justice Miller (who had dissented in *National Bank v. Matthews* on the ground that the mortgage was "void"). "But the argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all. . . . A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or busi-

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<sup>1</sup> See also *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434.



ness a shelter from the taxation imposed by the government on such business or transaction by whomsoever conducted " (pp. 260, 262).

*Fritts v. Palmer*, 132 U. S. 282. Corporations were forbidden to "purchase or hold real estate . . . except as provided in this act." Corporation M assumed to purchase Blackacre from A, and did not proceed according to the act. The deed was recorded. M assumed to mortgage the land, and, on foreclosure of the mortgage, B purchased. A granted to C. C was not permitted to maintain ejectment against B. The court relied on *National Bank v. Matthews*, and said (p. 293): "The question whether a corporation, having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the state within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so."<sup>1</sup>

*Case v. Kelly*, 133 U. S. 21 (1889). A railroad company asked the court to impose a trust upon certain lands in its favor. The ownership by it of such lands was *ultra vires*. The court declined to give the relief. "The question here is, not whether the courts would deprive [the corporation] of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones" (p. 28).

In 1890, *Central Transportation Co. v. Pullman's Car Co.* 139 U. S. 24 (cited above), was decided. "*The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it.*"

In *Logan County Bank v. Townsend*, 139 U. S. 67 (reported immediately after the *Central Transportation Co.* case), A assumed to sell to corporation M certain bonds the purchase of which was *ultra vires*. M promised to return the bonds on payment of a certain sum, and later refused to do so. In adjusting the rights of the parties, the court held that M could hold the bonds as security for the money advanced to the plaintiff, and relied upon *National Bank v. Matthews*.

In *Jacksonville Railway v. Hooper*, 160 U. S. 514, 524 (1895), the

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<sup>1</sup> Cf. *Chattanooga Ass'n v. Denson*, 189 U. S. 408.

court, in an emphatic *dictum*, approved the reasoning of Mr. Justice Gray in the Central Transportation Co. case.

*McCormick v. Market Bank*, 165 U. S. 538 (1897). A national bank assumed to take a lease of property before it had been authorized by the Comptroller to transact business. In an opinion written by Mr. Justice Gray the court declared the lease to be "void" (p. 553). The Central Transportation Co. case is followed, and *National Bank v. Matthews* is disposed of by saying that it "depended upon section 5137 of the Revised Statutes, specifying the purposes for which a national bank might purchase, hold and convey real estate, which, as construed by the court, did not make void mortgages taken for other purposes by a banking association authorized to transact business."

In 1897 came *California Bank v. Kennedy* (cited above). In this case the court did not mention in any way *National Bank v. Case*, 99 U. S. 628, 633, or *Salt Lake City v. Hollister*, 118 U. S. 256. The court said that *National Bank v. Matthews* had been distinguished in *McCormick v. Market Bank*.

*Sioux City Co. v. Trust Co.*, 173 U. S. 99 (1898). The court said it would follow the interpretation of a state statute by a state court to the effect that an *ultra vires* act was not void, but only voidable.

*Concord Bank v. Hawkins*, 174 U. S. 364 (1898). *California Bank v. Kennedy* was followed.

*Scott v. Deweese*, 181 U. S. 202 (1900). No increase of the stock of M was to be "valid" until the Comptroller gave a certain certificate. M assumed to increase its stock, but the Comptroller never gave the required certificate. A assumed to purchase some of this stock, and the question was whether he could be held to the liabilities of a stockholder. The court held that he could be so held. *National Bank v. Matthews* was mentioned as a case the doctrine of which had been often reaffirmed. The increase of stock without the Comptroller's certificate was a matter between the corporation and the government under whose laws it was organized. The difference between the case at bar and the *California Bank* case was apparent, — A had power to take stock in M, and could therefore be estopped to say the issue was not lawful.<sup>1</sup>

*Lantry v. Wallace*, 182 U. S. 536 (1900). Corporation M assumed to purchase some shares of its own stock. This purchase was *ultra*

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<sup>1</sup> Cf. *Scovill v. Thayer*, 105 U. S. 143.



*vires*. It thereafter sold the shares to A, and the court held that A might be held to the liabilities of a shareholder. "It cannot be held that the purchase by the bank of its own shares of stock was void" (p. 552).

In *O'Brien v. Wheelock*, 184 U. S. 450, 490 (1901), there is a *dictum*: "In the instance of contracts of a corporation beyond the scope of its corporate powers, the law is well settled in this court that nothing which has been done under them or the action of the courts can infuse any vitality into them."

*Schuyler National Bank v. Gadsden*, 191 U. S. 451, 458 (1903). The court proceeds on the principle of *National Bank v. Matthews*, and denies collateral attack.

*National Bank v. Converse*, 200 U. S. 425 (1905). The court proceeds on the principle of *California Bank v. Kennedy*, and permits collateral attack.

*Blair v. Chicago*, 201 U. S. 400, 450 (1905). The court said that the city of Chicago was not in a position to raise the question whether certain leases were not void for want of corporate power in the companies to make or receive them.

*Merchants Bank v. Wehrmann*, 202 U. S. 295 (1905). *California Bank v. Kennedy* was followed.

The people of the United States are eager to find in the decisions of the Supreme Court the most admirable results of the exercise of the judicial function. It would seem not to be a lack of real and proper respect for that court to say that its manner of handling *ultra vires* problems is most disappointing. There are two modes of thought, quite inconsistent with each other, used in its decisions. Sometimes it acts upon the one, sometimes upon the other. Upon any new question, it would be just a gamble as to which line of decisions would be followed.

The reasoning of Mr. Justice Gray in the Central Transportation Co. case is a source of great confusion. It is the revival of an antiquated conception of corporate action. It announces a sweeping rule, and yet the sweeping application of the rule would produce such monstrous results that no court would so apply it.

The court ought frankly to discard it, and to recognize that it cannot properly dispose of the *ultra vires* contracts and conveyances of a corporation as though they were the contracts and con-

veyances of a married woman or a monk under the common law.

In considering assumed corporate action by persons who have not been incorporated *de jure*, the courts carefully consider the circumstances, and determine whether or not there are sufficient reasons for denying collateral attack upon the formation of the corporation. In considering assumed corporate action by incorporated persons outside the scope of their powers, the courts should likewise carefully consider the circumstances and determine whether or not there are sufficient reasons for denying collateral attack upon the powers of the corporation. The courts have a duty, in both cases, to determine whether it is ever proper for them to give legal validity to unauthorized corporate action as corporate action.

It is submitted that the real question is, not whether there should be any doctrine denying collateral attack upon the powers of a corporation, but what should be the scope of such a doctrine.

This article deals specifically only with the question whether an executed transaction shall be a foundation of rights and liabilities.

Suppose that A assumes to convey to corporation M real or personal property which M is not authorized to take or hold, and that M thereafter assumes to convey it to B. Where is the title? If the transaction between A and M is "void," it is in A.

Granted that there was objection to M's ownership, that ownership has ceased. Let the *ultra vires* past bury its wrong. To hold the transaction to be "void" would render it highly dangerous for any one to purchase any property which any corporation had theretofore assumed to own, — and very large quantities of property have ostensibly been in corporate ownership at some time. The great public inconvenience which would result from any other rule has led the courts to deny collateral attack upon the powers of a corporation, when the only question presented is as to the power of the corporation to be a conduit of title. The authorities on this point are uniform.<sup>1</sup>

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<sup>1</sup> *Ayers v. The South Australian Banking Co.*, L. R. 3 P. C. 548, 549 (1871). Lord Justice Mellish said: "There may be also question whether, under any circumstances, the effect of violating such a provision is more than this, that the Crown may take advantage of it as a forfeiture of the charter, but the only point which it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or



Suppose, now, that A assumes to convey Blackacre to corporation M, and that M is not authorized to take or hold it, and M assumes to retain the property, so that the question is whether M is entitled to the rights, and is subject to the liabilities, which are the usual incidents of ownership.

The question may present itself in a number of ways.

1. A may seek to repudiate what he has done, and to claim still to be the owner of Blackacre. He may seek to maintain ejectment, or to have the deed to M removed as a cloud on his title. No court permits him to do so.<sup>1</sup> It is, however, to be conceded that to deny A relief does not necessarily require a court to hold that the executed *ultra vires* transaction is a foundation of rights in the corporation.

The court may decide the case on the ground that, if the title did

in lands under a conveyance or instrument which, under the ordinary circumstances of law, would pass it. . . . Their Lordships are of opinion that whatever other effect it has, it cannot have the effect of preventing the property passing. If that were otherwise, the consequences might be most lamentable, because if the property never passed to them, they could not themselves convey any property to third persons. . . . Mr. Manisty admitted that he could find no authority for the proposition that any violation of such a condition of a charter would prevent the property in goods passing to the person to whom an instrument otherwise valid professes to pass it." See also *Durham Building Society*, 12 Eq. 516; *Dronfield Coal Co.*, L. R., 17 Ch. D. 76, 97; *Batson v. London School Board*, 20 T. L. R. 22.

*Morris v. Hall*, 41 Ala. 510, 537; *Sherwood v. Alvis*, 83 Ala. 115 (A mortgages to M, B purchases at the foreclosure sale, and may maintain ejectment against A); *Bigsbee Co. v. Moore*, 121 Ala. 379 (M subscribed to and took stock in N, and transferred to A. A may recover dividends from N); *Barnes v. Suddard*, 117 Ill. 237; *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114; *Shewater v. Perrier*, 55 Mo. 218; *Ryan v. McElroy*, 98 Mo. 349; *Parish v. Wheeler*, 22 N. Y. 494, 504; *Matter of Long Acre Co.*, 188 N. Y. 361, 369; *Mallett v. Simpson*, 94 N. C. 37, 41; *Leazure v. Hillegas*, 7 S. & R. (Pa.) 313; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Gilbert v. Hol*, 2 S. Dak. 164; *Fritts v. Palmer*, 132 U. S. 282; *Lantry v. Wallace*, 182 U. S. 536.

The grantee, B, from M, contracts to sell to C. B may have specific performance. *Walsh v. Barton*, 24 Oh. St. 28.

<sup>1</sup> *Long v. Georgia Ry. Co.*, 91 Ala. 519, 521; *Hough v. Cook County Land Co.*, 73 Ill. 23; *Hayden v. Hayden*, 241 Ill. 183; *Ragan v. McElroy*, 98 Mo. 349; *Pittsburgh Co. v. Altoona Co.*, 196 Pa. 452. See also *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543, 606; *Barrow v. Nashville Co.*, 9 Humphrey (Tenn.) 304.

Similarly as to any privy of A. *Lathrop v. Commercial Bank*, 8 Dana 114; *Baker v. Northwestern Co.*, 36 Minn. 185; *Christian Union v. Yount*, 101 U. S. 352, 361.

Conversely the corporation cannot sue A to recover back the purchase price. *Hagerstown Mfg. Co. v. Keedy*, 91 Md. 430. To the same effect is *Baird v. Bank of Washington*, 11 S. & R. (Pa.) 411, 418.

A had land bounded by a lake. He deeded it to M, whose purchase was *ultra vires*. A has not thereafter the rights of a riparian proprietor against third parties. *Attorney-General v. Smith*, 109 Wis. 532.

not pass to M, in any event it passed out of A into the associates considered as so many natural persons.<sup>1</sup>

Or the court may refuse relief to A on the ground that A had been a party to an illegal transaction, and was not a proper subject for any relief. This is a doctrine stated in some opinions of the Supreme Court of the United States, notably those written by Mr. Justice Gray. He reasons thus: Everybody who deals with a corporation is charged with constructive notice of its powers. An *ultra vires* act is an illegal act. Therefore A, when he participated in the act, was *particeps criminis*.<sup>2</sup>

This is a ferocious doctrine. Unauthorized corporate action, simply because it is unauthorized, cannot with any propriety be said to be criminal. It is not even illegal, if that adjective is used to connote something particularly reprehensible, and not simply to connote something which is contrary to law.

In order to be incorporated, associates must file a certificate containing certain statements in a public office. A paper is filed, but it does not contain all the requisite statements. A contracts with the associates as a corporation. Here is unauthorized corporate action, and there is just as much reason for charging A with notice of the contents of the defective certificate, as there would be for charging him with notice of its contents if it had been in due form. It has never occurred to any court to call A "*particeps criminis*" under such circumstances; on the contrary, the courts are very liberal in giving A relief against the associates as a corporation.<sup>3</sup>

This ground for denying relief to A does not therefore commend itself.

The proper ground for denying relief would seem to be that, as a question of policy, the executed *ultra vires* transaction shall, apart from special circumstances, be a foundation of rights in the corporation. This would follow if the court took that position in the further cases to be considered.

2. A may get back the possession of Blackacre, or X, a casual trespasser, may get the possession, and M may wish to maintain ejectment. Certainly ejectment ought to lie either by M, or by the persons incorporated as so many natural persons. If ejectment is

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<sup>1</sup> See 20 HARV. L. REV. 470, note 23.

<sup>2</sup> St. Louis Railroad v. Terre Haute Railroad, 145 U. S. 393.

<sup>3</sup> See 20 HARV. L. REV. 456, and 21 HARV. L. REV. 305.



brought by M, there are no considerations of fairness in favor of A or X which require that they should be allowed collaterally to attack the power of M to be the owner of Blackacre. To determine whether the holding of Blackacre was, or was not, *ultra vires* might, and probably would, be anything but a simple matter and the determination of it would consume the time of the court. The defence of A or X, if established, would be merely technical. These are sufficient reasons for denying collateral attack by A or X.<sup>1</sup>

3. A tax might be assessed to M upon the land. To allow M to assert its own lack of power to escape the tax is to allow it to take advantage of its own wrong. It should not have the rights of ownership, without the liabilities.<sup>2</sup>

4. M may contract to convey the land to Y, and may thereafter ask for specific performance of the contract. M is now seeking, not to acquire, but to purge itself of something which it is unauthorized to have. We have already seen that the title if taken by Y will be

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<sup>1</sup> M may enjoin A, or a privy of A, from interference with the property. *Alexander v. Tolleston Club of Chicago*, 110 Ill. 65; *Reynolds v. Crawfordville Bank*, 112 U. S. 413.

M may cause A to be indicted for a trespass upon Blackacre, which trespass is criminal because the ownership is in M, a municipal corporation. *Commonwealth v. Wilder*, 127 Mass. 1.

A sold a three-quarters interest in Blackacre to B, and a one-quarter interest to M. The land was sold to satisfy a lien in favor of A's grantor. The whole lien was satisfied out of B's share of the proceeds, on principles which would hold if M acquired title to the one-quarter. B was not allowed to show that M's taking was *ultra vires*. *Litchfield v. Preston*, 98 Va. 530.

A conveyed to B, the conveyance being voidable because of the fraud of B. B conveyed to M, who paid value and had no notice of the fraud. M has the rights of a *bonâ fide* purchaser against A. *Schneider v. Sellers*, 98 Tex. 380.

M may maintain ejectment against the casual possessor. *Natoma Co. v. Clarkin*, 14 Cal. 544, 552; *Chicago R. R. Co. v. Keegan*, 185 Ill. 70. *Contra*, *Catholic Congregation v. Germain*, 104 Ill. 440 (but see *Hamsher v. Hamsher*, 132 Ill. 273, 286).

If the municipality damages Blackacre by changing the grade of the street, M may recover damages. *Louisville Property Co. v. Nashville*, 114 Tenn. 213 (foreign corporation).

M may lease Blackacre to B, and maintain an action for the rent against the lessee, *Rector v. Hartford Deposit Co.*, 190 Ill. 380, and the surety of the lessee, *Nantasket Co. v. Shea*, 182 Mass. 147. It may enforce other provisions of the lease. *Springer v. Chicago Trust Co.*, 202 Ill. 17; *Cowell v. Springs Co.*, 100 U. S. 55, 60.

M may maintain a petition under the Burnt Records Act to confirm its title. *Cooney v. Booth Packing Co.*, 169 Ill. 370.

M may acquire, by accretion, more land than it is authorized to hold and may maintain a bill to quiet its title to such land. *Chesapeake Co. v. Walker*, 100 Va. 69.

<sup>2</sup> *National Bank v. Case*, 99 U. S. 628; *Salt Lake City v. Hollister*, 118 U. S. 256.

unimpeachable. There is therefore no sufficient reason why the courts should not hold that M has a marketable title and grant it specific performance.<sup>1</sup>

So much as to land. Similarly it has been held in a variety of circumstances where M has assumed, *ultra vires*, to purchase a chattel,<sup>2</sup> or a negotiable instrument,<sup>3</sup> or a non-negotiable chose in action,<sup>4</sup> that M might enforce the usual incidents of ownership.

May it then be laid down as a general rule that an executed *ultra vires* transaction is a foundation of rights and liabilities?

Suppose that M purchased shares of stock in another corporation; N, and that the purchase was *ultra vires* of M. A usual incident of ownership of shares of stock is the right to vote. Yet it may be improper to permit M to vote. Why? The law forbids one corporation to own shares of stock in another corporation, largely to prevent one corporation from controlling, or influencing, the management of rival corporations. To permit M to vote might be to permit the very evil intended to be prevented. It would be at the expense

<sup>1</sup> If B contracts to buy, M may have specific performance. See *Davis v. Old Colony R. R.*, 131 Mass. 258, 273; *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576, 584; *Banks v. Poitiaux*, 3 Randolph 136.

A municipality could compel the sale to it of the property of a water company at a valuation, and sought so to do. It was obliged to pay for all the property held by the company for the purposes of its incorporation, whether that was in excess of the amount authorized or not. *West Springfield v. Aqueduct Co.*, 167 Mass. 128.

If M conveys to B, M may recover from B the purchase price. *Holmes & Griggs Co. v. Holmes & Wessell Co.*, 127 N. Y. 252, 260; *Fayette Land Co. v. Louisville R. R.*, 93 Va. 274 (vendor's lien in M enforced); *Rutland Co. v. Proctor*, 29 Vt. 93.

<sup>2</sup> *Ayers v. The South Australian Banking Co.*, L. R., 3 P. C. 548 (M maintains trover against privy of A); *Morris v. Hull*, 41 Ala. 510, 537 (A may not maintain trover against M); *Edwards v. Fairbanks*, 27 La. Ann. 449 (judgment creditors of A seize the chattels, and M is allowed to intervene in the execution proceedings and recover the goods); *Slater Woollen Co. v. Lamb*, 143 Mass. 420 (M sells the chattels to B, and may recover "on the contract").

*Contra*, *Trustees v. Dickenson*, 1 Dev. L. (N. C.) 189 (M may not maintain detinue for slaves. Decided in 1827).

<sup>3</sup> If M makes an *ultra vires* purchase of a negotiable instrument, it may enforce the note against prior parties. *Prescott National Bank v. Butler*, 157 Mass. 548 (and prior cases); *Merchants Bank v. Hansen*, 33 Minn. 40 (directly overruling *Farmers Bank v. Baldwin*, 23 Minn. 198, and *Bank of Rochester v. Pierson*, 24 Minn. 140); *Hennessy v. St. Paul*, 54 Minn. 219, 223; *Franklin Institution v. Roscoe*, 75 Mo. 408.

*Contra*, *Lazear v. National Union Bank*, 52 Md. 48, 125 (but see *United German Bank v. Katz*, 57 Md. 128, 141; *Black v. Bank of Westminster*, 96 Md. 399, 429).

<sup>4</sup> If M makes an *ultra vires* purchase of a non-negotiable chose in action, it may enforce it in the same manner in which any other assignee could have enforced it. *State Ins. Co. v. Farmers Co.*, 65 Neb. 31, 41; *Farwell Co. v. Wolf*, 96 Wis. 10.



of N, an innocent party. Collateral attack may properly be allowed, even in considering an executed transaction, if the denial of such attack would be to the substantial prejudice of an innocent party.<sup>1</sup>

It may, however, safely be said that the circumstances are special and exceptional where collateral attack should be allowed, if the corporation seeks to assert the rights of ownership usually incident to an executed transaction. Should the converse be true? Should a corporation which has the benefits of ownership be allowed to escape the liabilities? Is the result (as distinguished from the reasoning) in *California Bank v. Kennedy* sound?

It may be urged that this result is sound, since it protects the shareholders from losses attendant upon improper investments by the officers of the bank. This raises a fundamental question: for what acts, not done by the authority of the associates, is the corporation responsible? Certainly not every act done by an officer in the name of the corporation is to be considered the act of the corporation. Persons who deal with the officers of a corporation are, at least, charged with a duty to make reasonable inquiry as to whether the act is *ultra vires* of the corporation, and, if the act is *ultra vires*, and such reasonable inquiry would disclose this, no outsider can charge the corporation with any liability because of the act, unless the entire body of shareholders has ratified the act, in fact or in law.<sup>2</sup> It may therefore be that the corporation can defend against liability, on the

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<sup>1</sup> If M makes an *ultra vires* purchase of shares of stock in N, N cannot be compelled to register M as a shareholder. *Franklin Bank v. Commercial Bank*, 36 Oh. St. 350.

Even if M is registered as a shareholder it may not have the right to vote. *Memphis v. Woods*, 88 Ala. 630; *Jackson v. Newman*, 51 La. Ann. 833; *Coler v. Tacoma Co.*, 65 N. J. Eq. 347; *Milbank v. New York R. R.*, 64 How. Pr. (N. Y.) 20; *Parsons v. Tacoma Co.*, 25 Wash. 492, 508. See also *Dunbar v. Am. Tel. Co.*, 224 Ill. 9; *Bigelow v. Calumet Co.*, 155 Fed. 869.

As further illustrating the principle of the text see *Straus v. Eagle Insurance Co.*, 5 Oh. St. 59 (to be read with *White's Bank v. Toledo Co.*, 12 Oh. St. 601, 610). A insured with M, and suffered a loss. M made an *ultra vires* purchase of a note by A. M was not allowed to set off the note against A's claim.

See also *Central R. R. Co. v. Penn. R. R. Co.*, 31 N. J. Eq. 475, 495.

<sup>2</sup> This is a topic the adequate discussion of which would in itself take an article. See *In re European Society Arbitration Acts*, L. R. 8 Ch. D. 679; *Central Co. v. Smith*, 76 Ala. 572.

In *California Bank v. Kennedy*, one ground of defense was that the stock was issued to it without due authority from it in its corporate capacity. But this point was not discussed.

ground, not that it could not purchase, but that it did not, — that the purchase was not an act for which it is responsible.

Suppose, however, that the entire body of shareholders does ratify the act. The Supreme Court doctrine is that this makes no difference. "The transaction being absolutely void, could not be confirmed or ratified." This is a doctrine that the shareholders of a corporation, M, can authorize or ratify the purchase of shares in another corporation, N, that M can receive dividends upon the shares so long as N flourishes, but can then take advantage of its own wrong and repudiate all liability when N becomes embarrassed, and its innocent creditors seek to hold its shareholders to their liability. To such a result does the reasoning of Mr. Justice Gray lead. It seems flatly wrong, and to deserve the strictures which have been made upon it in some of the state courts.<sup>1</sup>

This article has dealt only with absolute transfers *inter vivos*. There seems to be, on principle and authority, no doubt but that such transactions may properly be regarded as executed. Whether mortgages, leases, devises, and bequests are to be regarded as executed or executory transactions are questions postponed to a subsequent article.

In conclusion it is submitted: (1) that the reasoning of Mr. Justice Gray in *Central Transportation Co. v. Pullman's Car Co.* is fallacious and mischievous, strongly resembling the reasoning in the very early authorities to the effect that a corporation *could* not commit a tort, and that this reasoning cannot be made the basis of any harmonious and equitable system of law to govern *ultra vires* transactions; (2) that a doctrine that collateral attack upon the powers of a corporation may be denied is unobjectionable in theory, and beneficial in application, and the courts have a duty to determine the proper scope of such a doctrine; (3) that if the *ultra vires* transaction is executed, and the sole question is whether the corporation was a conduit of title, collateral attack should be denied; (4) that if the *ultra vires* transac-

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<sup>1</sup> *Fidelity Insurance Co. v. German Savings Bank*, 127 Iowa 591; *Hunt v. Hansen Malting Co.*, 90 Minn. 282; *Security Bank v. St. Croix Co.*, 117 Wis. 211, 218. See also *Turtelot v. Whithed*, 9 N. Dak. 467, 476; *Wright v. Pipe Line Co.*, 101 Pa. St. 204.

The doctrine of the United States Supreme Court was followed in *Chemical Bank v. Havermale*, 120 Cal. 601; *Leonhardt v. Small*, 117 Tenn. 153; *Converse v. Emerson Co.*, 90 N. E. 269 (Ill.).



tion is executed, and the corporation seeks to assert the rights usually incident to ownership, collateral attack should, as a general but not universal rule, be denied; (5) that if the *ultra vires* transaction is executed, and the corporation seeks to repudiate the liabilities usually incident to ownership, collateral attack should be denied.

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## THE LIABILITY OF AN UNDISCLOSED PRINCIPAL.

### I.

§ 1. *Preliminary Considerations as to Liability.* — It is ordinarily to the interest, as it is usually the duty, of an agent in making contracts for his principal fully to disclose the fact of the agency and to make the contract in the name and on the account of the principal. It often happens, however, that the agent will either intentionally or unintentionally omit to do this. He may (1) disclose that he has a principal but conceal his name and identity; or he may (2) wholly conceal the fact that he is an agent and contract as though he were himself the principal in the transaction. In either of these cases the agent usually makes himself personally liable upon the contract. In the second case the liability of the agent is ordinarily clear, because no other person being known in the transaction, the agent is the one upon whom the liability directly rests. In the first case also the agent may be liable because, though disclosing the fact that he has a principal, but concealing his name, he may be held to have pledged his own responsibility.

Conceding that the agent thus is, or may be, liable upon the contract, the question arises whether the principal, if discovered, may be held liable upon it also. In favor of such a liability it may be urged that inasmuch as there is a principal in the transaction who has authorized the contract to be made and who is entitled to its benefits, the principal should be held liable upon the contract when he is discovered. Against such a liability it may be urged that it is contrary to the general principles of contract to permit a person to be bound upon a contract who does not appear to be a party to it, and that in the case where no principal was known to exist the effect of such a rule is to give to the other party the benefit of a liability which he did not contemplate at the time of making the contract and for which he did not stipulate. A right to hold the undisclosed principal in such a case would, as was pointed out by a distinguished English judge, come to the other party as a mere "God-send."



Whatever may be thought where the contract is informal and oral, it is certain that where the contract is in writing, and especially where it contains no intimation of the existence of a principal, a rational theory for the principal's liability is not easy to discover. The contract is in the name and over the signature of the agent. How can that name and signature be treated as the name and signature of the principal? If the agent also could not be held upon it, it might then be said that the agent's name had, for the time being, been adopted as the business name of the principal, and was therefore, in this case, the name of the principal. But if the agent is to be held liable also because it is his name, how can the principal be held upon the theory that the name used is not the agent's name but the business name of the principal? May the name be, at the same time, the actual name of the agent and the trade name of the principal?

A theory of the legal identification of the principal with the agent leads to the same result. If the principal and the agent are legally one and that one the principal, it may not be difficult to see that the contract is the principal's contract, but it is not easy to see how the contract is also the contract of the agent.

§ 2. *General Rule — Undisclosed Principal liable when discovered.* — Notwithstanding these objections, the considerations making for the principal's liability have generally prevailed under English law, though not under the Continental systems, and it is unquestionably the general rule of our law that an undisclosed principal, when subsequently discovered, may, at the election of the other party if exercised within a reasonable time, be held liable upon all simple non-negotiable contracts made in his behalf by his duly authorized agent, although the contract was originally made with the agent in entire ignorance of the existence of a principal.<sup>1</sup>

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<sup>1</sup> *Merrill v. Kenyon*, 48 Conn. 314; *Appeal of National Shoe & Leather Bank*, 55 Conn. 469; *Dashaway Ass'n v. Rogers*, 79 Cal. 211; *Simpson v. Patapsco Guano Co.*, 99 Ga. 168; *Baldwin v. Garrett*, 141 Ga. 876 (but the matter is regulated by the Code, § 3024); *Guest v. Burlington Opera House Co.*, 74 Ia. 457; *Steele-Smith Grocery Co. v. Potthast*, 109 Ia. 413; *Edwards v. Gildemeister*, 61 Kan. 141; *Jones v. Johnson*, 86 Ky. 530; *Ware v. Long*, 24 Ky. Law Rep. 696; *Hyde v. Wolf*, 4 La. 234; *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538; *Henderson v. Mayhew*, 2 Gill (Md.) 393; *Mayhew v. Graham*, 4 Gill (Md.) 363; *Tobin v. Larkin*, 183 Mass. 389; *Schendell v. Stevenson*, 153 Mass. 351; *Hunter v. Giddings*, 97 Mass. 41; *Exchange Bank v. Rice*, 107 Mass. 37; *Byington v. Simpson*, 134 Mass. 169; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Eastern R. R. Co. v. Benedict*, 5 Gray (Mass.) 561; *Lerned v.*

The rule applies not only where the principal has in fact received the benefits of the contract, but also where the contract still remains executory.<sup>1</sup>

The rule itself is doubtless an anomaly, but even so it is undoubtedly as well settled as any other rule in the law of Agency.<sup>2</sup>

§ 3. *Rule applies to all Simple Contracts.* — This general rule imposing obligations upon the undisclosed principal when discovered, extends to all contracts made by oral negotiation under his authority. It also, by the weight of authority, applies to all simple non-negotiable contracts in writing, entered into by an agent in his own name and within the scope of his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and al-

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Johns, 9 Allen (Mass.) 419; Nat'l Ins. Co. v. Allen, 116 Mass. 398; Schweyer v. Jones, 152 Mich. 241; Lindeke Land Co. v. Levy, 76 Minn. 364; Simmons Hdw. Co. v. Todd, 79 Miss. 163; Weber v. Collins, 139 Mo. 501; Lamb v. Thompson, 31 Neb. 448; Greenberg v. Palmieri, 71 N. J. L. 83; Elliott v. Bodine, 59 N. J. L. 567; Yates v. Repetto, 65 N. J. L. 294; Borchertling v. Katz, 37 N. J. Eq. 150; Jennings v. Davies, 29 N. Y. App. Div. 227; Taintor v. Prendergast, 3 Hill (N. Y.) 72; Briggs v. Partridge, 64 N. Y. 357; Cobb v. Knapp, 71 N. Y. 348; Inglehart v. Thousand Island Hotel Co., 7 Hun (N. Y.) 547; Coleman v. First Nat'l Bank, 53 N. Y. 388; Dykers v. Townsend, 24 N. Y. 61; Meeker v. Claghorn, 44 N. Y. 349; Jessup v. Steurer, 75 N. Y. 613; Adolff v. Schmitt, 13 N. Y. Misc. 623; Davis v. Lynch, 31 N. Y. Misc. 724; City Trust Co. v. Amer. Brew. Co., 174 N. Y. 486; Patrick v. Grand Forks Merc. Co., 13 N. D. 12; Harper v. Tiffin Nat'l Bank, 54 Ohio St. 425; Smith v. Plummer, 5 Whart. (Penn.) 89; Hubbert v. Borden, 6 Whart. (Penn.) 91; Rice v. Fidelity & Casualty Co., 1 Lack. Leg. News (Penn.) 111; Episcopal Church v. Wiley, 2 Hill (S. C.) Ch. 584; s. c. 1 Riley (S. C.) Ch. 156; Waddill v. Sebree, 88 Va. 1012; Belt v. Washington Water-Power Co., 24 Wash. 387; Ford v. Williams, 21 Howard (U. S.) 287; Moore v. Sun Ptg. & Pub. Assn., 41 C. C. A. 506; Boland v. Northwestern Fuel Co., 34 Fed. 523; Higgins v. Senior, 8 M. & W. 834; Browning v. Provincial Ins. Co., L. R. 5 P. C. App. 263; Calder v. Dobell, L. R. 6 C. P. 486; Trueman v. Loder, 11 A. & E. 594; Smethurst v. Mitchell, 1 E. & E. 622; Thomson v. Davenport, 9 B. & C. 78.

<sup>1</sup> See Tobin v. Larkin, 183 Mass. 389; Lerner v. Johns, 9 Allen (Mass.) 419; Dykers v. Townsend, 24 N. Y. 61; Hubbert v. Borden, 6 Whart. (Penn.) 91; Waddill v. Sebree, 88 Va. 1012.

<sup>2</sup> Kayton v. Barnett, 116 N. Y. 625.

In an article upon the general subject by Professor Ames in 18 Yale Law Journal 443, it is suggested that, instead of attempting to work out a rule under which the principal can be held directly liable in an action at law, the legal liability should be held to be where the contract itself puts it, namely, upon the agent, but that then, in as much as it is the duty of the principal to exonerate the agent from the liabilities incurred on his account, the other party should be permitted in equity to avail himself of this liability of the principal to the agent, thereby putting the liability ultimately, where it justly belongs, upon the principal on whose account the contract was made. Many practical objections to a remedy purely equitable will, however, at once suggest themselves.



though the party dealing with the agent supposed that the latter was acting for himself;<sup>1</sup> and this rule obtains as well in respect to contracts which are required to be in writing, as to those to whose validity a writing is not essential.<sup>2</sup>

§ 4. *Parol Evidence to identify the Principal.* — For the purpose of identifying the principal, parol evidence may be admitted. It does not violate the principle which forbids the contradiction of a written agreement by parol evidence, nor that which forbids the discharging of a party by parol from the obligations of his written contract. The writing is not contradicted, nor is the agent discharged; the result is, merely, that an additional party is made liable.<sup>3</sup> As is said by a learned judge in a Massachusetts case:

"Whatever the original merits of the rule that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency."<sup>4</sup>

§ 5. *Rule does not apply to Contracts under Seal.* — It was a fundamental principle of the common law that, upon an instrument under seal, those persons only can be charged who appear upon its face to

<sup>1</sup> Briggs v. Partridge, 64 N. Y. 357; Dykers v. Townsend, 24 N. Y. 61; Coleman v. First Nat. Bank, 53 N. Y. 393; Ford v. Williams, 21 How. (U. S.) 289; Weber v. Collins, 139 Mo. 501; Waddill v. Sebree, 88 Va. 1012; Belt v. Washington Power Co., 24 Wash. 387.

<sup>2</sup> Tobin v. Larkin, 183 Mass. 389; Borchertling v. Katz, 37 N. J. Eq. 150; Briggs v. Partridge, *supra*. Cf. Bourne v. Campbell, 21 R. I. 490, probably wrong.

<sup>3</sup> Higgins v. Senior, 8 M. & W. 834; Huntington v. Knox, 7 Cush. (Mass.) 371; Ford v. Williams, 21 How. (U. S.) 287; Lindeke Land Co. v. Levy, 76 Minn. 364 (overruling Rowell v. Oleson, 32 Minn. 288); Belt v. Washington Power Co., 24 Wash. 387. There is language contrary in a number of cases though they are practically all distinguishable: Ferguson v. McBean, 91 Cal. 63 (a sealed instrument); Gillig v. Road Co., 2 Nev. 214 (a negotiable instrument). Chandler v. Coe, 54 N. H. 561; Heffron v. Pollard, 73 Tex. 96; Silver v. Jordan, 136 Mass. 319; Matter of Bateman, 7 N. Y. Misc. 633; Brown v. Tainter, 114 N. Y. App. Div. 446, sometimes referred to, were cases of a disclosed principal and involved a different question, elsewhere considered. Murphy v. Clarkson, 25 Wash. 585, is *contra*, but the court apparently overlooked the distinction between ordinary simple contracts in writing and negotiable instruments, which was involved in Shuey v. Adair, 18 Wash. 188.

<sup>4</sup> Holmes, J., in Byington v. Simpson, 134 Mass. 169 [citing Huntington v. Knox, 7 Cush. (Mass.) 371; Eastern R. R. v. Benedict, 5 Gray (Mass.) 561; Lerner v. Johns, 9 Allen (Mass.) 419; Hunter v. Giddings, 97 Mass. 41; Exchange Bank v. Rice, 107 Mass. 37; National Ins. Co. v. Allen, 116 Mass. 398; Higgins v. Senior, 8 M. & W. 834].

be the parties to it.<sup>1</sup> Under this rule an undisclosed principal could not be charged upon such an instrument.<sup>2</sup>

<sup>1</sup> "Where a contract is made by deed, under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it, and, therefore, if made by an attorney or agent, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it." Shaw, C. J., in *Huntington v. Knox*, 7 Cush. (Mass.) 374.

<sup>2</sup> *Huntington v. Knox*, *supra*; *Haley v. Belting Co.*, 140 Mass. 73; *Mahoney v. McLean*, 26 Minn. 415; *Briggs v. Partridge*, 64 N. Y. 357; *Kiersted v. Orange*, etc. R. Co., 69 N. Y. 343; *Schaefer v. Henkel*, 75 N. Y. 378; *Henricus v. Englert*, 137 N. Y. 488; *Farrar v. Lee*, 10 N. Y. App. Div. 130; *Whitehouse v. Drisler*, 37 N. Y. App. Div. 525; *Williams v. Magee*, 76 N. Y. App. Div. 512; *Spencer v. Huntington*, 100 N. Y. App. Div. 463 (aff'd without opinion 183 N. Y. 506); *Denike v. De Graaf*, 87 Hun, 61 (aff'd, no opinion, 152 N. Y. 650); *Benham v. Emery*, 46 Hun 156; *Smith v. Pierce*, 60 N. Y. Supp. 1011; *Stanton v. Granger*, 125 N. Y. App. Div. 174; *Willard v. Wood*, 135 U. S. 309, 313; *Badger Silver Min. Co. v. Drake*, 31 C. C. A. 378; *City of Providence v. Miller*, 11 R. I. 272.

*Briggs v. Partridge*, 64 N. Y. 357, is a leading case. In this case it appeared that an agent appointed by parol had, without disclosing his agency, made in his own name a contract under seal for the purchase of real estate, but it was held that the contract was not enforceable against the principal either as a contract under seal or as a simple contract. Andrews, J., said: "Can a contract under seal, made by an agent in his own name for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered? No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form that it is, in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement. . . . The plaintiff's agreement in this case was with Hurlburt (the agent) and not with the defendant. The plaintiff has recourse against Hurlburt on his covenants, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change it from a specialty to a simple contract, in order to charge the defendant, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to, or interested in it, on proof *dehors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal, so as to embrace this case." See also *Tuthill v. Wilson*, 90 N. Y. 423. So the rule that an unnamed and unknown principal shall stand liable for the contract of his agent does not apply to a lease under seal. The relation between the owner of land and those who occupy it is of a purely



The common-law incidents attached to the presence of a seal were confessedly highly technical, and efforts have been made in many places to abolish them. In several States statutes have been enacted, though not always in the same form or having the same effect. In Minnesota, for example, the statute has abolished seals and declared that the addition of a seal to an instrument shall "not affect its character in any respect." Under this statute it has been held that an undisclosed principal may be charged upon an instrument under seal.<sup>1</sup>

On the other hand in Texas, where the statute declares that a seal shall not be necessary to the validity of any contract, etc., and that the addition of a seal shall not "in any way affect the force and effect of the same," it was held that the statute had not changed the common-law rule with respect to the undisclosed principal.<sup>2</sup>

§ 6. — With reference to authority for the execution of instruments, a distinction has been made, between instruments to whose validity a seal is an essential and those to which a seal may happen to be attached but which would be perfectly valid and effective without it, — it being held in the latter case that the unnecessary seal might be disregarded as so much surplusage and the instrument dealt with, so far as authority for its execution is concerned, as though no seal were attached.

Extending that doctrine still further, it has been suggested that it may be availed of here, — that is to say, that for the purpose of charging an undisclosed principal an unnecessary seal may be regarded as non-existent; and a number of cases have adopted the

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legal character, and the fact that a lessee takes a lease for an unnamed principal, but in his own name, will not render the unnamed principal liable for the rent. *Borchering v. Katz*, 37 N. J. Eq. 150. And this is true although the fact of the agency is recited and it extrinsically appears that the lessee acted as agent, and although the principal occupies the premises without assignment of the lease and furnishes money to pay the rent. *Kiersted v. Orange, etc. R. R. Co.*, 69 N. Y. 343. See also *Haley v. Belting Co.*, 140 Mass. 73; *Schaefer v. Henkel*, 75 N. Y. 378; *Rand v. Moulton*, 72 N. Y. App. Div. 236.

A contract for the sale of land made by the agent under seal in his own name and not disclosing any principal cannot be specifically enforced against the principal even though it be alleged that he ratified it. *Stanton v. Granger*, 125 N. Y. App. Div. 174. No action for damages against the principal will lie in such a case. *Mahoney v. McLean*, 26 Minn. 415.

<sup>1</sup> *Streeter v. Janu*, 90 Minn. 393. To same effect, *Gibbs v. Dickson*, 33 Ark. 107,

<sup>2</sup> *Sanger v. Warren*, 91 Tex. 472. See also *Jones v. Morris*, 61 Ala. 518, 524.

suggestion, at least so far as to permit the undisclosed principal to sue upon the contract.<sup>1</sup>

So far as action upon the contract itself is concerned, however, many other cases, chiefly in New York, have refused to apply this theory, and have held to the general rule.<sup>2</sup>

In a few cases contracts clearly intended to be the contract of the principal, but sealed with the seal of the agent, have been held enforceable by and against the principal as simple contracts.<sup>3</sup>

There undoubtedly may also be cases in which, though no action will lie against the principal upon the contract itself, there may yet be such elements of adoption or receipt of benefits of a contract actually authorized by him as to justify a recovery against him upon an implied promise.<sup>4</sup>

§ 7. *Does not apply to Negotiable Instruments.* — In addition to the limitation upon the principal's liability growing out of the nature of the instrument under seal, "there is," as pointed out in a case already referred to,<sup>5</sup> "a well-recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent." This doctrine has been applied in many cases.<sup>6</sup>

It is entirely possible, however, notwithstanding this rule, that an action may, in many instances, be maintained against the principal,

<sup>1</sup> *Stowell v. Eldred*, 39 Wis. 614; *Kirschbon v. Bonzel*, 67 Wis. 178; *Lancaster v. Knickerbocker Ice Co.*, 153 Pa. 427; *Love v. Sierra Nevada, etc. Co.*, 32 Cal. 639.

<sup>2</sup> *Briggs v. Partridge*, 64 N. Y. 357; *Kiersted v. Orange, etc. R. Co.*, 69 N. Y. 343; *Schaefer v. Henkel*, 75 N. Y. 378; *Henricus v. Englert*, 137 N. Y. 488; *Spencer v. Huntington*, 100 N. Y. App. Div. 463; *Denike v. De Graaf*, 87 Hun (N. Y.) 61; *Smith v. Pierce*, 60 N. Y. Supp. 1011; *Stanton v. Granger*, 125 N. Y. App. Div. 174, and other New York cases cited *supra*.

<sup>3</sup> *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Dubois v. Delaware & Hud. Canal Co.*, 4 Wend. (N. Y.) 285.

<sup>4</sup> *Moore v. Granby Mining Co.*, 80 Mo. 86.

<sup>5</sup> *Briggs v. Partridge*, 64 N. Y. 357.

<sup>6</sup> *Heaton v. Myers*, 4 Colo. 59; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531; *Webster v. Wray*, 19 Neb. 558; *Cortland Wagon Co. v. Lynch*, 82 Hun (N. Y.) 173; *Ranger v. Thalmann*, 84 N. Y. App. Div. 341; affirmed on opinion below, 178 N. Y. 574; *Andenton v. Shoup*, 17 Ohio St. 126; *Shuey v. Adair*, 18 Wash. 188; *Cragin v. Lovell*, 109 U. S. 194; *Ducarrey v. Gill, Mood. & Mal.* 450.



not upon the note itself, but upon the consideration for which it was given.<sup>1</sup>

§ 8. *Exceptions to the General Rule.* — The general rule, moreover, is subject to certain exceptions. Of these the most direct and immediate are two. One of them grows out of the question whether the other party should be permitted to recover of the principal if the latter has already paid, credited, or settled with the agent. The other, whether such a recovery should be allowed if the other party has already taken steps indicating that he intends to charge the agent.

For the purpose of discussion, these two exceptions may be tentatively stated as follows:

1. *Where Principal has settled with Agent.* — That the principal is not liable where, before the other party has intervened with his claim, the principal has settled with, paid, or credited the agent in good faith, and in reliance upon such a state of conduct or representations on the part of the other party as to reasonably lead the principal to infer that the agent had already settled with such other party, or that the latter looks exclusively to the agent for payment.

2. *Where other Party has elected to hold Agent only.* — That the principal cannot be held liable where the other party, with full knowledge as to who was the principal, and with the power of choosing between him and the agent, has distinctly and unquestionably elected to treat the agent alone as the party liable.

§ 9. *Of the First Exception — Change in Accounts — Misleading Conduct.* — This subject has been much discussed in the English courts and various and conflicting rules have been laid down in successive cases. Some of these rules have been adopted by the courts and text-writers in this country, but have been afterwards denied or limited by later cases in the English courts, and the result has been an exceedingly unsatisfactory condition of the law.

§ 10. *Thomson v. Davenport.* — One of the earliest of these cases is that of *Thomson v. Davenport*,<sup>2</sup> decided in the Court of King's Bench in 1829. In that case the agent disclosed that he was acting for a principal in Scotland but did not disclose his principal's name. Lord Tenterden, in his opinion, said:

"I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards

<sup>1</sup> *Coaling Co. v. Howard*, 130 Ga. 807.

<sup>2</sup> 9 Barn. & Cress. 78.

discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal”;

and Bayley, J., in the same case, said:

“Where a purchase is made by an agent, the agent does not, of necessity, so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent.”

The rule as laid down by Lord Tenterden was approved by Mr. Parsons in his work on Contracts,<sup>1</sup> and by Judge Story in his work on Agency.<sup>2</sup> It was also adopted in Indiana.<sup>3</sup>

§ 11. *Heald v. Kenworthy*. — Following this case came *Heald v. Kenworthy*,<sup>4</sup> decided in the Exchequer in 1855. The case arose upon the sufficiency of a plea to a declaration for goods sold and delivered. The plea alleged that the goods were bought for defendant by his agent; that the latter bought in his own name and not in that of defendant; that plaintiff gave credit to the agent not knowing of defendant; and that while plaintiff still gave credit to the agent defendant, in good faith, “at reasonable and proper times and according to the usual course of dealing” between himself and his agent, settled with the agent, believing and having reason to believe that the latter would settle with the plaintiff.

The plea was held not to be good. The expressions of Lord Tenterden and Bayley, J., were shown to be mere *dicta*, and were held to be inaccurate statements of the law. Parke, B., who delivered the leading opinion, limited the rule to those cases in which the principal has been misled by the action of the seller, saying:

<sup>1</sup> 1 Parsons on Contracts, 63.

<sup>2</sup> Thomas v. Atkinson, 38 Ind. 248.

<sup>3</sup> Story on Agency, § 449.

<sup>4</sup> 10 Exch. 739.



"If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal."

§ 12. *Armstrong v. Stokes*. — Afterwards arose the case of *Armstrong v. Stokes*,<sup>1</sup> decided in the Court of Queen's Bench in 1872. In this case J. & O. Ryder, who were commission merchants at Manchester, acting sometimes for themselves and sometimes as agents, having received an order for goods from defendants, bought them of plaintiff, without disclosing that they were not acting for themselves.

J. & O. Ryder delivered the goods to defendants, who paid for them in good faith. Afterward J. & O. Ryder failed, not having paid the plaintiff. Later it was discovered by plaintiff that J. & O. Ryder had bought the goods for the defendants, and thereupon the plaintiff brought the action to charge defendants as undisclosed principals, but it was held that defendants' payment to J. & O. Ryder was a bar to recovery. Blackburn, J., who delivered the opinion of the court (Blackburn, Mellor, and Lush), held that the rule laid down by Parke, B., was too narrow, and cited and approved that advanced by Lord Tenterden and Mr. Justice Bayley.

Referring to the rule of Parke, B., the court say:

"We think that if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit, it would produce intolerable hardship. It may be said, perhaps truly, this is the consequence of that which might originally have been a mistake, in allowing the vendor to have recourse at all against one to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule. But we find an exception (more or less extensively expressed) always mentioned in the very cases that lay down the rule; and without deciding anything as to the case of a broker, who avowedly acts for a principal (though not necessarily named), and confining ourselves to the present case, which is one in which, to borrow Lord Tenterden's phrase in *Thomson v. Davenport*,<sup>2</sup> the plaintiff sold the goods to J. & O. Ryder (the agents), 'supposing at the time of the contract he was dealing with a principal,' we think

<sup>1</sup> L. R. 7 Q. B. 598, 3 Eng. (Moak) 217.

<sup>2</sup> *Supra*.

such an exception is established. We wish to be understood as expressing no opinion as to what would have been the effect of the state of the accounts between the parties if J. & O. Ryder had been indebted to the defendants on a separate account, so as to give rise to a set-off or mutual credit between them. We confine our decision to the case where the defendants, after the contract was made, and in consequence of it, *bonâ fide* and without moral blame, paid J. & O. Ryder at a time when the plaintiff still gave credit to J. & O. Ryder and knew of no one else. We think that after that it was too late for the plaintiff to come upon the defendant."

§ 13. *Irvine v. Watson* — *In the Queen's Bench*. — This case, in its turn, was followed by *Irvine v. Watson*,<sup>1</sup> decided in the Queen's Bench in 1879, in which Bowen, J., laid down the following rules:

"There are two classes of sales through an agent to an undisclosed principal which it is necessary to distinguish. 1. Where the seller supposes himself to be dealing with a principal, but discovers afterwards that he has been selling to an agent, and that there is an undisclosed principal behind, the law allows the seller to have recourse on such discovery to the undisclosed principal, provided always<sup>2</sup> that the principal has not meanwhile paid the agent, or that the state of accounts between the principal and agent does not render it unjust, *i. e.*, inequitable that the seller should any longer look to the principal for payment. This statement of the proviso which relieves the undisclosed principal in certain cases from all necessity to pay the seller was thought by Parke, B., and the other judges in *Heald v. Kenworthy*<sup>3</sup> to be too large without further explanation, and they expressed the view that the only case in which the seller under such circumstances was precluded from having recourse to the undisclosed principal when discovered, was when the seller, by some conduct of his own, had misled the principal into paying or settling with his agent in the interim. The principal, such is the reasoning of the Court of Exchequer, has originally authorized his agent to create a debt, and the principal cannot be discharged from the debt unless the seller has estopped himself, by his conduct, from enforcing it against him. The Court of Queen's Bench in *Armstrong v. Stokes*<sup>4</sup> do not adopt this narrower version of Lord Tenterden's and Mr. Justice Bayley's proviso. They revert to the wider language used by Lord Tenterden and Bayley, J., in *Thomson v. Davenport*,<sup>5</sup> and it must now be taken to be the law that a seller who has given credit to an agent, believing him to be a principal, cannot have re-

<sup>1</sup> 5 Q. B. Div. 102, 29 Eng. Rep. (Moak) 186.

<sup>2</sup> See per Lord Tenterden, C. J., and Bayley, J., in *Thomson v. Davenport*, 9 B. & C. 78.

<sup>3</sup> 10 Exch. 745.

<sup>4</sup> *Supra*.

<sup>5</sup> *Supra*.



course against the undisclosed principal, if the principal has *bonâ fide* paid the agent at a time when the seller still gave credit to the agent, and knew of no one else except him as principal.

"2. The present case is one that belongs to a distinct but analogous class. At the time of the dealing in the goods, the seller was informed that the person who came to buy was buying for a principal, but was not told, and did not ask, who that principal was, nor anything further about him. *Thomson v. Davenport*<sup>1</sup> is the leading authority to show that, in such a case, where no payment or settlement in account between the undisclosed principal and his agent has intervened, the seller may afterwards have recourse to the undisclosed principal. But what if the undisclosed principal has meanwhile innocently paid or settled with his agent? If indeed such payment or settlement is the result of any misleading conduct on the part of the seller, then, no doubt, the general principle alluded to in *Heald v. Kenworthy*<sup>2</sup> would equally apply, and the seller could no longer pursue his remedy against the man whom he had misled. But is this the only proviso, or must a wider proviso still in the present class of cases be engrafted on the statement of the rule, similar to the proviso as finally sanctioned in *Armstrong v. Stokes*.<sup>3</sup> This was a case in which, at the time of sale, exclusive credit had been given by the seller to the agent, who bought in his own name as principal. In the present instance the agent bought, it is true, in his own name, but held out to the seller the additional advantage of the credit of an unnamed principal behind. What difference to the liability of the principal does this make? It is obvious that when, as in *Armstrong v. Stokes*,<sup>4</sup> the seller deals exclusively with the agent as principal, the seller sells knowing, if his buyer turns out to have a principal behind him, the principal will have, at all events, been justified in assuming, as the fact is, that the seller deals simply with the agent. The principal may be expected to arrange with his agent on this basis. If before recourse is had to him, the undisclosed principal has put his agent in funds to pay, the seller cannot afterward object that the undisclosed principal, who had a right to suppose his credit was not looked to in the matter, should have held his hand. The case is altered where the agent, when buying, states he has a principal whose existence, though he does not name him, he is authorized in mentioning. I think that the liability of the principal, who under such circumstances pays his agent, to pay over again to the seller must depend in each case on what passes between the seller and the agent, acting within the scope of his authority, and on the precise nature of the contract which the agent has lawfully made. . . . The essence of such a transaction is that the seller, as an ultimate resource,

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<sup>1</sup> *Supra*.

<sup>2</sup> *Supra*.

<sup>3</sup> *Supra*.

<sup>4</sup> *Supra*.

looks to the credit of some one to pay him if the agent does not. Till the agent fails in payment, the seller does not want to have recourse to this additional credit. It remains in the background; but if, before the time comes for payment, or before, on non-payment by the agent, recourse can be fairly had to the principal whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller behind the seller's back of his credit. It surely must, at all events, be the law that in the case of sales of goods to a broker the principal, known or unknown, cannot, by paying or settling before the time of payment comes, with his own agent, relieve himself from responsibility to the seller, except in the one case where exclusive credit was given by the seller to the agent. But may the payment or settlement to or with the agent be safely made in such a case after the day of payment has arrived, and if so within what time? It seems to me that it can only safely be made if a delay has intervened which may reasonably lead the principal to infer that the seller no longer requires to look to the principal's credit, — such a delay, for example, as leads to the inference that the debt is paid by the agent, or to the inference that, though the debt is not paid, the seller elects to abandon his recourse to the principal and to look to the agent alone."

§ 14. *Irvine v. Watson in the Court of Appeal*. — *Irvine v. Watson*, however, went to the Court of Appeal,<sup>1</sup> where, while the result reached below was affirmed, the court declare the rule as laid down by Parke, B., in *Heald v. Kenworthy*, to be the true one.

The court did not expressly overrule *Armstrong v. Stokes* [Bramwell, L. J., spoke of it as "a very remarkable case"; and Brett, L. J., declared it depended upon "the peculiar customs obtaining in Manchester in relation to the business of commission merchants"], as the difference in the facts enabled them to draw a distinction between the cases, but Bramwell, L. J., said :

"It is to my mind certainly difficult to understand that distinction, or to see how the mere fact of the vendor's knowing or not knowing that the agent has a principal behind him can affect the liability of that principal. I should certainly have thought that his liability would depend upon what he himself knew, that is to say, whether he knew that the vendor had a claim against him and would look to him for payment in the agent's default";

and Brett, L. J., said :

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<sup>1</sup> 5 Q. B. Div. 414. The opinions differ more or less as reported in these various reports. The quotations in the text are made from the official edition.



"If the case of *Armstrong v. Stokes* arises again, we reserve to ourselves sitting here, the right of reconsidering it."

The distinction of Parke, B., was again approved in *Davison v. Donaldson*,<sup>1</sup> decided in the Court of Appeal in 1882.

The result, therefore, of the English cases seems to be to limit the exception to that first stated by Parke, B.

§ 15. *What is Misleading Conduct.* — The question of what acts or conduct of the other party may be sufficient to reasonably lead the principal to believe that the agent only is relied upon, has not been much considered, and it is not one which readily lends itself to definite rules. It must be largely a question of fact in each particular case. In *Irvine v. Watson*<sup>2</sup> the defendants had given their broker an order to buy goods and the broker had bought them in his own name of the plaintiffs, stating that he had a principal but not disclosing his identity. The invoice given by plaintiffs to the broker stated that the terms were, "Cash (or before delivery if required) allowing 2½ per cent discount." The broker rendered to defendants a statement of the purchase stating terms of payment, "Cash, less 2½ per cent." The sellers however did not insist upon cash on or before delivery. They made no demand on the broker for payment for five or six days. Then they demanded payment from him at intervals for about ten days, after which, the broker having stopped payment, they made demand for the first time upon defendants. In the meantime defendants had paid the broker. Under these circumstances defendants urged that they had a right to believe from the fact that the terms were "cash," that plaintiffs would not have delivered the goods unless they had gotten their pay, and that therefore defendants were justified in paying the broker within the rule of *Heald v. Kenworthy*. It appeared, however, that even where the

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<sup>1</sup> L. R. 9 Q. B. Div. 623.

<sup>2</sup> *Irvine v. Watson*, 5 Q. B. Div. 414.

In *Kymer v. Suwercroft*, 1 Camp. 109, it was said that permitting the time of payment to pass without a demand upon the principal was a misleading circumstance; but no such point was actually involved in the case. See *Smyth v. Anderson*, 7 C. B. 21. Cf. *Macfarlane v. Giannacopulo*, 3 H. & N. 860. See this point in *Armstrong v. Stokes*, *supra*; also the argument in *Heald v. Kenworthy*, 10 Exch. 739.

In *Horsfall v. Fauntleroy*, 10 B. & C. 755, a statement in a sales catalogue that the terms of credit on which the agent bought were bill at two months was held sufficient to lead the principal to believe that the agent must have given his bill for the goods and to protect him in thereupon accepting the agent's draft.

terms of sale were "cash," there was no fixed custom of insisting upon payment at the precise time of delivery, and that it was not infrequent to allow a few days of grace after delivery. It also appeared that defendants had paid the broker (by accepting his draft which he immediately discounted) before part of the goods had in fact been delivered. It was held that these facts furnished no sufficient evidence that defendants had been misled by the plaintiffs. Bramwell, L. J., said:

"The terms of the contract were 'cash on or before delivery,' and it is said that the defendants had a right to suppose that the sellers would not deliver unless they received payment of the price at the time of delivery. I do not think, however, that this is a correct view of the case. The plaintiffs had a perfect right to part with the oil to the broker without insisting strictly upon their right to prepayment, and there is, in my opinion, nothing in the facts to justify the defendants in believing that they would so insist. No doubt if there was an invariable custom in the trade to insist on prepayment where the terms of the contract entitled the seller to it, that might alter the matter; and in such case non-insistence on prepayment might discharge the buyer if he paid the broker on the faith of the seller already having been paid. But that is not the case here: the evidence shows that there is no invariable custom to that effect."

In *Davison v. Donaldson*<sup>1</sup> one of several owners of a boat bought supplies for her of the plaintiffs. The latter knew that there were other owners, though it does not appear that he knew who they were. The goods were charged to the one who bought them. He collected the amount from the other co-owners but did not pay the plaintiff. The plaintiff finally sued the other owners. Their defense was that they had settled with the managing owner believing that he had paid the plaintiff, and that they had been misled by the fact that the plaintiff had not pressed his claim against the purchaser who had now become insolvent. It did not appear, however, that there had been any unreasonable delay at the time they settled with the managing owner, and the real gist of the defendants' contention was that if they had known of plaintiffs' claim against them they could have recovered the money from the managing owner before he became insolvent. This was held not sufficient to release defendants. Jessel, M. R., said:

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<sup>1</sup> *Davison v. Donaldson*, 9 Q. B. Div. 623. See also *The Huntsman* [1894], p. 214.



"The principal cannot be heard to say that the subsequent conduct of the plaintiff induced him not to sue the agent for repayment of the money. Independently of the settlement of accounts there is no evidence that the mere abstaining from pressing the agent is an injury to the principal. A debtor must find out his creditor and go and pay him. . . . No doubt in many cases principals may reasonably rely on the honor of their agents, and may not require vouchers; but when they come into a court of law and seek to excuse themselves from liability, and it turns out that they have not required the production of vouchers, they must expect the court to deal strictly with them."

Bowen, L. J., said:

"I do not say that in very special circumstances mere delay may not amount to misrepresentation: it may be conduct misleading the defendant. But that can only be when there is something in the original contract or in the conduct of the parties which renders the delay misleading. The creditor is not obliged to apply to all his debtors if he can get payment from one of them."

This case, however, as was pointed out by the judges, was not the mere case of principal and agent because the defendants were co-owners or partners with the managing owner and jointly liable with him.

Giving the agent a receipt for the price, even though mistakenly, upon the strength of which the principal in good faith pays or credits the agent, will be such conduct as protects the principal.<sup>1</sup>

§ 16. — It must be kept in mind that this exception differs from the one to be discussed in a subsequent article. This is not a question of election but of misleading. It is essential here that the principal shall have done something — shall have paid or credited or otherwise altered his situation — which will prejudice him if he now be called upon to pay. No such act is necessary where election alone is involved.

It is also possible that that which would not suffice to constitute an election may be sufficient to relieve the principal under this rule if he has reasonably acted upon it to his prejudice. For example, the commencement of suit against the agent is, as will be seen, not usually regarded as sufficient to constitute an election. But would the principal be liable again if, after the other party who knows

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<sup>1</sup> *Cheever v. Smith*, 15 Johns. (N. Y.) 276; *English v. Rauchfuss*, 21 N. Y. Misc. 424; *Brown v. Telegraph Co.*, 30 Md. 39; *Hyde v. Wolf*, 4 La. 234.

there is a principal has sued the agent, the principal in reliance thereon should pay the agent?

§ 17. *The Rule in the United States.* — The subject has not very frequently arisen in the United States, and has not been thoroughly considered in any very recent case by a court of last resort. In the earlier cases, as was naturally to be expected, the tendency was to follow the rule laid down by Judge Story and Professor Parsons, based upon the *dictum* of Lord Tenterden.<sup>1</sup> A general statement of the rule was made some years ago by the New York Court of Appeals<sup>2</sup> with the exception, "provided he has not in the meantime in good faith paid the agent"; but the statement was a mere *dictum*. Most of the cases which have arisen since *Irvine v. Watson* was decided by the Court of Appeal have either ignored that decision or apparently failed to note its full significance.<sup>3</sup>

§ 18. *General Conclusions.* — Notwithstanding the remarks of Bramwell, L. J., the distinction between the case where the other party knows that there is a principal in existence though he does not

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<sup>1</sup> Thus, for example, in 1847, in *Clealand v. Walker*, 11 Ala. 1058; in 1855, in *Fish v. Wood*, 4 E. D. Smith (N. Y. Com. Pleas), 327; in 1871, in *Thomas v. Atkinson*, 38 Ind. 248; in 1879, in *McCullough v. Thompson*, 45 N. Y. Super. 449. See also *Ketchum v. Verdell*, 42 Ga. 534; *Emerson v. Patch*, 123 Mass. 541. The Georgia code enacts substantially the rule of *Thomson v. Davenport*.

On the contrary, in 1866, in *York County Bank v. Stein*, 24 Md. 447, the rule of Baron Parke in *Heald v. Kenworthy* was approved in reliance upon the statement of the editor of Story on Agency.

<sup>2</sup> *Knapp v. Simon* (1884), 96 N. Y. 284.

<sup>3</sup> The question was quite fully considered in 1885 in *Laing v. Butler*, 37 Hun (N. Y.) 144. The court cites *Armstrong v. Stokes* and *Irvine v. Watson* as applying to different classes of cases, and apparently without attaching much importance to the comments made upon the former case by the Court of Appeal when *Irvine v. Watson* was before it.

There is also a very interesting discussion in *Fradley v. Hyland* (1888), 37 Fed. 49; *Irvine v. Watson*, in the Queen's Bench Division, is cited, but not the case in the Court of Appeal.

A very general reference to the matter is made in *Berry v. Chase*, 146 Fed. 625. See the cases reviewed (in 1889) by Mr. John W. Beaumont in 23 *American Law Review* 565.

The question was involved in *Nicholson v. Pease*, 61 Vt. 534, and the syllabus indicates the case as holding that "a traveling salesman who is furnished with money by his employer to pay his expenses while on the road, cannot bind his principal for the payment of such expenses if, before receiving notice from the party extending such credit, the employer has settled with his salesman and allowed him the amount of such expenses." There is, however, no discussion of this point in the opinion.

There is a statement of the English rule as a *dictum* in *Simmons Hardware Co. v. Todd*, 79 Miss. 163, and *Guest v. Burlington Opera House Co.*, 74 Iowa 457.



know who he is, and that where he is totally ignorant of the existence of such a person, seems not without significance. Certainly if the other party is to be charged with the consequences of his misleading conduct, it seems much more reasonable and just to do so where he knows that there is a principal whose actions may be affected by his conduct than where he has no such knowledge. It may be suggested that every person who deals without expressly excluding that possibility may always be regarded as potentially an agent with an undisclosed principal; but the suggestion seems forced, if not fanciful.

Nevertheless, the rule of Parke, B., seems on the whole to be reasonable and just. If a principal sends an agent to buy goods for him and on his account, it is not unreasonable that he should see that they are paid for. Although the seller may consider the agent to be the principal, the actual principal knows better. He can easily protect himself by insisting upon evidence that the goods have been paid for, or that the seller, with full knowledge of the facts, has elected to rely upon the responsibility of the agent; and if he does not, but, except where misled by some action of the seller, voluntarily pays the agent without knowing that he has paid the seller, there is no hardship in requiring him to pay again. If the other party has the right, within a reasonable time, to charge the undisclosed principal upon his discovery, — and this right seems to be abundantly settled in the law of agency, — it is difficult to see how this right of the other party can be defeated, while he is not himself in fault, by dealings between the principal and the agent, of which he had no knowledge, and to which he was not a party.

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[*To be concluded.*]

## CRIMINAL CONSPIRACIES IN RESTRAINT OF TRADE AT COMMON LAW.

THE federal courts have now very thoroughly settled the scope of the Sherman Anti-Trust Act of 1890. A large number of states have passed legislation making certain combinations in restraint of trade criminal, and the courts of these states have adjudged a considerable number of cases arising under such laws. New remedies are, however, being continually suggested, and it is therefore important that the ground should be cleared by an understanding of the principles of the common law affecting trade combinations. A discussion of these principles from the point of view of the criminal law will be the scope of the present article.

The first case it is believed, in which the criminality of a trade combination has been directly passed upon in a jurisdiction where no statute affecting the case exists, is that of *State v. Eastern Coal Company*.<sup>1</sup> This case arose on a demurrer to an indictment which charged substantially that the five defendants, consisting of four corporations and one individual (the occupations of the defendants not being stated) did "combine, confederate and conspire together by divers unlawful and fraudulent devices, contrivances and acts unlawfully to regulate the price at which coal should be sold in the City of Providence, which said coal was then and there an article of prime necessity to the public and the consumers thereof."

The court sustained the demurrer. The rationale of the decision was that monopoly was the gist of the common-law offense, and that as it did not appear from the indictment that the defendants were coal dealers, or that they had any power of control over the coal trade, they could not create a monopoly. The court put itself on record, *obiter*, as of the opinion that if a monopoly of a prime necessity of life were shown to exist, it would have been criminal.

In this case, the state in order to sustain the indictment was obliged to contend that *any* agreement to regulate the price of a prime necessity of life was criminal at common law, and the court in sustaining the demurrer necessarily decided that this was not so. The question

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<sup>1</sup> 29 R. I. 254.



involved in the decision is briefly this: Shall business men be allowed *under any circumstances* to make agreements fixing the prices of commodities?

The Sherman Act, as interpreted by the courts, has decided this question to a considerable extent for combinations doing an interstate business, and has made illegal all agreements "restraining trade," whether reasonable or unreasonable.<sup>1</sup> It has been consistent, however, and has applied the same rule to labor combinations that applies to combinations of capital.<sup>2</sup>

At common law, on the other hand, labor combinations, agreements to strike, peaceable primary boycotts, and the like are very generally upheld, unless they go to the extent of unreasonableness, as in the case of secondary boycotts. Some regulations of capital are undoubtedly necessary, but if the law deems criminal combinations to secure a fair profit, while it upholds combinations to secure fair wages, the employer of labor bids fair to be crushed between the upward pressure of labor on the one side and the downward pressure of competition and the criminal law on the other. Competition for him is likely to become, not the life, but the death of trade.

Few of the typical trade agreements contemplate the doing of anything that is ordinarily regarded as criminal or even civilly unlawful if done by an individual. The great majority of them that have come into the courts have related to the establishment of prices, either directly or indirectly, and an individual, unless engaged in business of a public or *quasi*-public character, may fix his own prices or even refuse to sell his commodities at all, as he pleases. Accordingly it is probably necessary to resort to some doctrine of the law of conspiracy in order to impress the mark of criminality upon agreements or combinations to do things which the individual might do with impunity so far as the criminal law is concerned. To determine the criminality of such trade combinations the end sought to be accomplished and the means of accomplishing it must be examined, for it is elementary that the character of means and end is the determining feature of a criminal conspiracy.

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<sup>1</sup> U. S. v. Freight Association, 166 U. S. 290; U. S. v. Joint Traffic Association, 171 U. S. 505, 570; Bement v. Nat. Harrow Co., 186 U. S. 70, 92; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211; Harlan, J., in Northern Securities Co. v. U. S., 193 U. S. 197, 331. See 23 HARV. L. REV. 353.

<sup>2</sup> See Loewe v. Lawlor, 208 U. S. 274 (Danbury Hatters' Case).

"A conspiracy is a confederation to do something unlawful either as a means or an end."<sup>1</sup>

So also the courts have often said, that "before the courts can punish or prevent a conspiracy, either the act conspired or the manner of its doing must be unlawful."<sup>2</sup>

Two classes of cases have arisen under these definitions. Some courts have held that the means or the end must be *criminally* illegal.<sup>3</sup> A conspiracy to restrain competition by assaulting the customers of a competitor would fall within this class. Other courts have said that it is sufficient, if the means or the end are civilly illegal.<sup>4</sup> A combination to keep away the customers of another by oral false representations would come within this definition.

Either of these views, if logically followed out, would seem to be reasonable. The test, however, should relate to the conduct of the individual members of the combination, if the definition is to be of use. To argue otherwise is to say a combination is illegal because it is illegal.<sup>5</sup>

Some of the *dicta*, however, have attempted to extend the doctrine of criminal conspiracy further and hold that a conspiracy is criminal if it is "to effect a purpose which has a tendency to prejudice the public." The case most frequently cited for this proposition is *State v. Buchanan*,<sup>6</sup> but the statement there contained was clearly *obiter*, and it is doubtful if there is any decided case which must necessarily be supported on this ground. If the doctrine were well founded any trade agreement which the court thought had a tendency to preju-

<sup>1</sup> *State v. Bacon*, 27 R. I. 252. See also *King v. Jones*, 4 B. & Ad. 345; *Richardson Case*, 1 M. & Rob. 402; *People v. Clark*, 10 Mich. 310; *Jetton-Dekle Lumber Co. v. Mather*, 43 So. 590, 591 (Fla.); *State v. Stevens*, 30 Ia. 391; *State v. Keach*, 40 Vt. 113.

<sup>2</sup> *Jetton-Dekle Lumber Co. v. Mather*, 43 So. 590, 591.

<sup>3</sup> *Commonwealth v. Hunt*, 4 Met. (Mass.) 111.

<sup>4</sup> *State v. Bacon*, 27 R. I. 252. The weight of authority in the United States may be said to be in accord with this view.

<sup>5</sup> See *Wright on Criminal Conspiracies* (Carson's Notes), p. 50, where Mr. Wright says: "Moreover, in whichever of these senses (*i. e.*, criminally or civilly) the word 'unlawful' is used, it must, if it is to be the defining word in the definition of criminal combinations, mean unlawful with reference to the conduct of an individual; for if it is meant unlawful with reference to combinations it would do nothing for defining the meaning of 'unlawful' as applied to combinations, and it would be merely a restatement and not a definition."

<sup>6</sup> 5 Har. & J. 317 (Md., 1821).



dice the public might be held criminal, and an economic rather than a legal test would be the basis of the decisions.<sup>1</sup>

What, then, is the status of the authorities at common law relating to trade agreements?

In England the crimes of forestalling, engrossing, and regrating were early recognized. They are defined by Stephens in his "History of the Criminal Law of England"<sup>2</sup> as follows:

"Forestalling, engrossing, and regrating was the offense of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted goods on their way to market and bought them up so as to be able to command what price he chose when he got to the market. The engrosser or regrator — for the two words had much the same meaning — was a person who, having bought goods wholesale, sold them again wholesale. This was regarded as a crime."

It is uncertain, perhaps, how far these crimes depended upon statutory enactment. Certainly their prevention was often assisted by statute.<sup>3</sup>

Even by the definitions given in the various statutes, however, they are seen to be specific crimes, generally applicable to local conditions only, and the statutes do not make criminal all restraints of trade, whether reasonable or unreasonable. Some of these statutes related to forestalling, engrossing, and regrating, and others specifically fixed the price at which various commodities should be sold. Thirty-nine such statutes are enumerated in the repealing statute passed in 1844.<sup>4</sup>

One of the earliest of the English cases relating to restraints of trade was *Rex v. Journeymen Tailors of Cambridge*.<sup>5</sup> In this case the Journeymen Tailors "were indicted for a conspiracy among themselves to raise their wages," and were found guilty. Upon a motion in arrest of judgment the judgment was confirmed, the court relying upon *The Tubwomen v. The Brewers of London*.<sup>6</sup> This case, of course, does not concern a combination affecting commodi-

<sup>1</sup> See Eddy, *Combinations*, §§ 353, 354.

<sup>2</sup> Vol. iii, p. 199.

<sup>3</sup> For example, see 25 Edw. III, Stat. 4, c. 3 (1350), and 5 & 6 Edw. VI, c. 14. This statute and five other acts were repealed in England in 1772 by 12 Geo. III, c. 71, and the common-law offenses of engrossing, regrating, and forestalling were abolished in 1844 by 7 & 8 Vict., c. 24.

<sup>4</sup> 7 & 8 Vict. c. 24.

<sup>5</sup> 8 Mod. 10 (1721).

<sup>6</sup> This apparently refers to a case entitled *Mr. Attorney v. Starling, etc., Brewers of London*, 1 Keb. 650, 1 Siderfin 174, 83 Eng. Rep. (reprint) 1164.

ties, and the *dictum* in it with regard to conspiracies is not supported by later authorities. The decision may, however, be supported by reference to the Statute of 2 & 3 Edw. VI, c. 15, under which such combinations were forbidden and made criminal.

The case of *King v. Norris*<sup>1</sup> involved an indictment against the proprietors of salt works for combining to raise the price of salt. Lord Mansfield is reported to have said rather quaintly that

"If any agreement was made to fix the price of salt or any other necessary of life (which salt emphatically was) the court would be glad to lay hold of an opportunity from what quarter soever the complaint came to show their sense of the crime, and at what rate soever the price was fixed, high or low, made no difference, for all such agreements were of bad consequence and ought to be discountenanced."

The report of this case is obviously imperfect and it does not appear that there was any actual decision. The criminality of the conspiracy has been said to be based upon any one of three statutes which were in existence at the time.<sup>2</sup> Whether or not any one of these statutes will account for this case, the remarks of Lord Mansfield were no more than *dicta*. They constitute, however, probably the broadest statement of the doctrine of such conspiracies that is to be found in any reported case.

The next reported case is *King v. Eccles*.<sup>3</sup> This was an indictment against a combination of tailors for conspiring to impoverish another tailor, and to hinder him from exercising his trade. They were convicted, and upon motion in arrest of judgment the judgment was affirmed. The case turns upon a point of pleading rather than of law, but there is in it a *dictum* of Lord Mansfield's, similar in tone to what he said in *Rex v. Norris*, *supra*.

*King v. Eccles* clearly did not decide anything with regard to the substantive law of criminal conspiracies in restraint of trade. Nevertheless, Lord Ellenborough, in *Rex v. Turner*,<sup>4</sup> explained it by saying "That case was considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public."

<sup>1</sup> 2 Kenyon, 300 (1758).

<sup>2</sup> See 37 Edw. III, c. 5; 25 Hen. VIII, c. 2; 2 & 3 Edw. VI, c. 15; Wright, *Criminal Conspiracies and Agreements*, p. 47; 37 Edw. III, c. 5, was repealed by 38 Edw. III, c. 2. See also 5 & 6 Edw. VI, c. 14. Salt was held to be a victual within the meaning of this statute, according to a case referred to in 3 Coke's Institutes, cap. 89, p. 195.

<sup>3</sup> 1 Leach 274 (1783).

<sup>4</sup> 13 East 227.



It must be admitted, also, that there seemed to be a quite general impression that all conspiracies in restraint of trade were unlawful. Thus in *Mitchell v. Reynolds*<sup>1</sup> Parker, C. J., declared, "In all restraints of trade, where nothing more appears, the law presumes them bad." This, however, was only a *dictum*, and it does not appear that "criminal" rather than civilly illegal was meant.

In 1780 the case of *King v. Waddington*<sup>2</sup> was decided. This was not a case of conspiracy, though it is sometimes cited as if it were. It was an indictment against an individual for spreading false rumors to enhance the price of hops, the false rumors consisting in stating that the supply of hops was almost exhausted and that there would be a scarcity of them. This was held a crime, and the defendant was fined £500 and sentenced to one month's imprisonment. The spreading of false rumors seems to have been clearly recognized as criminal independently of combination.<sup>3</sup> The essence of this crime seems to have been the falseness of the rumors circulated by the defendant.

The same defendant, who it appeared was a large grower and merchant of hops, was afterwards again indicted for the crime of engrossing hops.<sup>4</sup> The defendant being found guilty, Grose, J., passed sentence of another fine of £500 and imprisonment for three months, saying that "the particular offense of engrossing, which still remained an offense at common law, was calculated to create an artificial scarcity where none existed in reality, and to aggravate that calamity where it did exist."

*Rex v. De Berenger*<sup>5</sup> was an indictment for a conspiracy to raise the price of public funds by means of false rumors. The indictment was upheld. As already seen, it was illegal for an individual to raise prices by spreading false rumors. The conspiracy was, therefore, criminal within the ordinary definition of conspiracy.

Nevertheless, there are later expressions by English judges by which it appears that the effect of the early English cases was mis-

<sup>1</sup> 1 P. Wms. 181 (1711).

<sup>2</sup> 1 East 143.

<sup>3</sup> See 7 & 8 Vict. c. 24, § 4, which did away with the common-law offenses of forestalling, engrossing, and regrating, and repealed the statutes relating thereto, but expressly saved the offense of spreading or conspiring to spread false rumors to enhance or decry the price of merchandise. See also Wright, *Criminal Conspiracies and Agreements*, pp. 24, 35, 36; *Maddockes Case*, 2 Rolle's Rep. 107; 3 Coke's Inst. c. 89, p. 196.

<sup>4</sup> 1 East 167.

<sup>5</sup> 3 Maule & Sel. 67 (1814).

understood. Thus in *Hilton v. Eckersley*,<sup>1</sup> which was a civil case not involving criminal conspiracy at all, but simply the question of enforcing a bond alleged to be in restraint of trade, we find Justice Crompton saying:

"I think that combinations like that disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture."

In the later English cases, however, the effect of the early cases seems to have been more clearly understood, and the courts show a tendency to recede from the earlier view. Thus in *Urnstun v. Whitelegg Brothers*<sup>2</sup> there was a civil action to enforce a penalty under the rules of an association of mineral water manufacturers, fixing prices for ten years with a penalty for violation. It was held that the contract was not enforceable, but the court said:

"This contract is illegal in the sense of not being enforceable; it is not necessary that it should be such as to form the ground of criminal proceedings."

The inference here seems to be that the agreement would not be criminal, and the court would therefore seem to disavow the doctrine that all combinations to fix prices of commodities are criminal.

A similar opinion was entertained by several judges in the case of *Mogul Steamship Company v. McGregor*, which was a civil action for damages arising out of a combination between certain steamship companies, by which rates were to be fixed and various other methods taken to avoid the ruinous effects of competition. The case went through all the courts to the House of Lords, and it was established that such a combination, no force or fraud being used, was not actionable.

In the course of his opinion Lord Herschel<sup>3</sup> said:

"It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated" (*i. e.*, in the sense that it rendered parties to it subject to criminal prosecution).

In the same case, when it was before the Queen's Bench Division,<sup>4</sup> Bowen, L. J., said:

<sup>1</sup> 6 El. & Bl. 47, 53 (1856).

<sup>3</sup> L. R. App. Cas. 25, 39 (1892).

<sup>2</sup> 63 L. T. Rep. N. S. 455.

<sup>4</sup> L. R. 23 Q. B. D. 598, 619.



"Lastly, we are asked to hold the defendants' conference or association illegal as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called, in restraint of trade, are not in my opinion illegal in any sense, *except that the law will not enforce them.*"

So also in the same case Lord Watson said:<sup>1</sup>

"I cannot for a moment suppose that it is the proper function of the English Courts of Law to fix the lowest prices at which traders can sell, for the purpose of protecting or extending their business without committing a legal wrong which will subject them to damages."

Passing now to the American cases, we come to the early Pennsylvania case of *Commonwealth v. Carlisle*.<sup>2</sup> The decision in the case arose out of *habeas corpus* proceedings to obtain the release of certain "master ladies' shoemakers" who had been arrested on a charge of conspiracy for agreeing with each other not to employ any journeyman who would not consent to work at reduced wages. It also appeared that the object went no further than to establish certain rates which had prevailed a few months before, from which there was reason to believe the employers had been compelled to depart by a combination among the journeymen. The motion to discharge was made on the ground that such a combination was no offense by the common law of Pennsylvania.

Gibson, J., held that the question was whether the relators "have been actuated by an improper motive," and that the case should therefore be submitted to a jury. In the course of his opinion the learned judge said:

"If the bakers of a town were to combine to hold up the article of bread, and by means of a scarcity thus produced, extort an exorbitant price for it, although the injury to the public would be only collateral to the object of the association, it would be indictable."

This would seem to be forestalling within the decision of *King v. Waddington*.

This case shows a tendency to go as far, perhaps, as any American case, and yet the point for which it is most often cited, *i. e.* as to combining to raise the price of bread, was only a *dictum*.<sup>3</sup>

<sup>1</sup> See also *Wickens v. Evans*, 3 Y. & J. 318 (1829), *per* Hullock, B.; *Jones v. North*, L. R. 19 Eq. 426, *per* Bacon, V. C.

<sup>2</sup> *Brightly's Rep. (Pa.)* 36, (1821).

<sup>3</sup> This case is adversely criticized in *Eddy, Combinations*, § 354.

*Commonwealth v. Tack*,<sup>1</sup> another Pennsylvania case, was an indictment for conspiring to cheat the prosecutor by inducing him to sell oil on time, on the representation that the price of oil was to be lower; it was alleged that the prosecutor commenced to sell oil and that the defendants, by means of false rumors and by forestalling the market, caused an advance in price. The court sent the case to a jury and ruled, in accordance with the request of the defendants, "that it is not an unlawful conspiracy for them to agree to purchase oil on their joint account with a view to making a profit upon the resale," and that, in order to make the combination criminal, "it must appear that the price is to be affected by some other means than the mere naked purchase: there must be some fraud, falsehood, or deceit used and intended to affect the price, and the motive must be dishonest." At the preliminary hearing the court also said, "It was not *per se* indictable to raise the price of oil on a given day, neither was it *per se* an offense to combine honestly to do so."

This case clearly indicates that an agreement to regulate prices, where there is no fraud or illegal means used, and where the agreement is for the fair protection of the parties, would be legal.

A still later Pennsylvania case, and one often cited, is that of *Morris Run Coal Co. v. Barclay Coal Co.*,<sup>2</sup> which was a civil action arising out of a contract entered into by a number of dealers in coal, by which the prices of coal were to be regulated by a committee and the business of the contracting parties was to be otherwise controlled. The defense was that the contract was illegal as being in restraint of trade. The court held that the contract was a New York contract, and that it was illegal under the New York statute which made it an offense to conspire "to commit any act injurious to the public health, to public morals, or to trade or commerce." In reaching their conclusions, however, the court made various observations, all of which were *dicta*, with regard to conspiracies, among them the following:

"The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract, it is an offense."

And again the court says:

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<sup>1</sup> 1 Brewst. (Pa.) 511 (1868).

<sup>2</sup> 68 Pa. St. 173 (1871).



"Every 'corner,' in the language of the day, whether it be to affect the price of articles of commerce, such as bread-stuffs, or the price of vendible stocks, when accomplished by confederation to raise or depress the price and operate on the markets, is a conspiracy."

These *dicta* are often cited, however, to sustain the doctrine that all such combinations were criminal at common law.

In New York, also, there have been a number of cases which are frequently cited as holding that conspiracies to affect prices were criminal at common law. Among the earliest is *People v. Fisher*.<sup>1</sup> This case was an indictment of certain journeymen shoemakers for combining to prevent other journeymen shoemakers from working at less than certain wages, by refusing to work for shoemakers who employed journeymen who had worked for lower wages than that allowed by the association. A question arose as to the sufficiency of the indictment, and it was held that the offense was an indictable conspiracy under the New York statute making it an offense for two or more persons to conspire to commit any act injurious to trade or commerce. The court repeated in the course of its opinion the well-known maxim that "Competition is the life of trade." The court also said:

"The right does not exist either to enhance the price of the article, or the wages of the mechanic, by any forced or artificial means. . . . The cloth merchant may say that he will not sell his goods for less than so much per yard, but has no right to say that any other merchant shall not sell for a less price. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to affect such an object are injurious, not only to the individual particularly oppressed, but to the public at large."<sup>2</sup>

The other New York cases are all based upon the New York statute already quoted. Most of them are civil actions, and in few of them is anything said about the criminality of combinations in restraint of trade generally.<sup>3</sup> These cases, therefore, are not au-

<sup>1</sup> 14 Wend. (N. Y.) 9 (1835).

<sup>2</sup> See also *People v. Sheldon*, 139 N. Y. 251, which was an indictment under the New York statute of a combination of all the coal dealers except one in Lockport, N. Y. In this case there was a binding agreement among the dealers of the most sweeping kind, and there was held to be an indictable conspiracy under the statute.

<sup>3</sup> See *Hooker v. Vandewater*, 4 Denio 349; *Stanton v. Allen*, 5 Denio 434; *People v. Fisher*, 14 Wend. 9; *Arnot v. Coal Co.*, 68 N. Y. 558; *People v. North River Sugar Refining Co.*, 121 N. Y. 582; *People v. Milk Exchange*, 145 N. Y. 267; *DeWitt*

thority for the proposition that conspiracies in restraint of trade were criminal at common law. Nevertheless, it has been occasionally said by judges elsewhere that the New York statute was but a reenactment or even a limitation of the common-law offenses.<sup>1</sup> But an examination of the English cases and early statutes must convince one that there was not at common law any broad general offense of a conspiracy to commit "any act injurious to trade or commerce," but rather a number of specific offenses relating to specific articles of commerce and to specific, well-defined methods of restraining it.

Somewhat related to the question as to the criminality of combinations is the subject of the validity (civilly) of contracts in restraint of trade, especially when they are contracts fixing the prices of commodities, dividing up territory for the sale of commodities among competitors, and the like. But the law on this subject is well settled that it is a question of reasonableness in each particular case. The courts will enforce such contracts if they are reasonable, even though trade is restrained, prices are fixed, and competition is reduced.<sup>2</sup>

As to what constitutes unreasonableness the courts are by no means agreed. But the fact that certain agreements in restraint of trade are invalid and unenforceable in a civil action does not constitute an argument for holding them illegal criminally. If, however, an agreement is upheld when reviewed in a civil action, it is clear that no criminal liability could ensue for entering into it.

In *Kellogg v. Larkin*<sup>3</sup> the question arose as to the validity of a produce association composed of mill-owners and warehousemen, in which there were various features affecting the price of wheat in the Milwaukee market, and by which the warehousemen agreed to give mill-owners "full, absolute, and uninterrupted control of the

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*Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 14 N. Y. Supp. 277; *Strait v. Nat. Harrow Co.*, 18 N. Y. Supp. 224; *Judd v. Harrington*, 139 N. Y. 105.

<sup>1</sup> See *Raymond v. Leavitt*, 46 Mich. 447.

<sup>2</sup> See *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; *Skrainka v. Scharinghausen*, 8 Mo. App. 522; *Tode v. Gross*, 127 N. Y. 480; *Kellogg v. Larkin*, 3 Pinn. (Wis.) 123; *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant's Ch. (Can.) 540; *Herriman v. Menzies*, 115 Cal. 16; *Manchester & Lawrence R. Co. v. Concord R. Co.*, 66 N. H. 100; *Wood M. & R. Co. v. Greenwood Hardware Co.*, 75 S. C. 378; *Over v. Byram Foundry Co.*, 37 Ind. App. 452; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Leslie v. Lorrillard*, 110 N. Y. 519; *Proctor v. Sargent*, 2 Man. & G. 20 (1840); *Rannie v. Irvine*, 7 Man. & G. 969 (1844); *Benwell v. Inns*, 24 Beav. 307 (1857); *Hearn v. Griffin*, 2 Chit. Rep. 407; *Hoffman v. Brooks*, 23 Am. L. Reg. 648, and note.

<sup>3</sup> 3 Pinn. (Wis.) 123.



Milwaukee wheat market." It was held that the agreement was valid, apparently on the ground that a complete monopoly was not created. The court quoted Parker, J., in *Mitchell v. Reynolds*<sup>1</sup> to the effect that the creation of a monopoly would be criminal; but said that "the word 'monopoly' is used to signify something which is very different from aught that could have been intended by this contract. The learned judge himself (*i. e.* Parker, J.) interprets it in another part of the same opinion. He says 'that to obtain the sole exercise of any known trade throughout England is a complete monopoly, and against the policy of the law.' He adds that when restrained to particular places or persons, if lawfully or fairly obtained, the same is not a monopoly."

So also in a number of other cases in this country it has been decided that agreements by which prices of various commodities were regulated were not invalid, generally upon the ground that an actual monopoly was not created.<sup>2</sup>

In Canada, also, it has been held that an agreement between persons engaged in the manufacture and sale of salt in Ontario, by which all salt manufactured by the parties to the agreement should be sold through trustees, and the price thus regulated, was valid.<sup>3</sup> This case was decided on the ground that no monopoly was created, inasmuch as there were other persons engaged in the production of salt in the Province of Ontario. The court in this case declared that the old common-law offense of engrossing was not in force in Canada, although no statute abolishing it had been passed there. The court said that the agreement was no more than one by which two persons bound themselves not to undersell each other, and that such an agreement would not be invalid.

The above cases were all civil cases, but certainly the courts deciding them would likewise hold that the agreements under review were not criminal. Whether they would have held that similar

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<sup>1</sup> 1 P. Wms. 181.

<sup>2</sup> *Skrainka v. Scharinghausen*, 8 Mo. App. 522 (combination among twenty-four owners of stone quarries); *Manchester & Lawrence R. Co. v. Concord R. Co.*, 66 N. H. 100 (agreement between two railroad companies fixing rates); *Wood M. & R. Co. v. Greenwood Hardware Co.*, 75 S. C. 378 (combination among dealers in rakes and mowers); *Over v. Byram Foundry Co.*, 37 Ind. App. 452 (agreement fixing prices between two dealers in sash weights); *Herriman v. Menzies*, 115 Cal. 16 (agreement fixing prices among stevedores).

<sup>3</sup> *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant's Ch. (Can.) 540.

agreements, had they been so wide in their scope as to be "monopolistic," were criminal, is a question difficult to determine. Undoubtedly there is a marked tendency to differentiate agreements which create monopolies from others, but in most of the cases cited it is not stated that such monopolies are necessarily criminal. Thus in *Oakdale Mfg. Co. v. Garst*<sup>1</sup> the court simply said, "Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good"; and this generally is the tone of the *dicta* relating to civil cases.<sup>2</sup>

In some, too, the courts lay down the rule that monopolies of necessities of life are invalid. In the case of *Herriman v. Menzies*<sup>3</sup> the court said that "an agreement, the purpose or effect of which is to create a monopoly, is unlawful, if it relate to some staple commodity or thing of general requirement or use, or of necessity, and not something of mere luxury or convenience."

This supposed distinction between necessities and luxuries has however been repudiated by a number of courts. The great diversity of opinion as to what constitutes necessities makes the distinction one of very little value. For example, beer, alcohol, distilling products, preserves, gas pipes, powder, harrows, capsules, envelopes, wire cloth, bluestone, cigarettes, and other articles have been classed as necessities by various courts.<sup>4</sup> As has been said by one judge,<sup>5</sup> if these articles are to be ranked as necessities, the rule might as well be said to apply to articles of merchandise generally. Judge Taft also declared that "the introduction of such a distinction furnishes another opportunity for courts to give effect to the various economic opinions of its individual members."<sup>6</sup>

It must be admitted, however, that there are at least some *dicta* in the cases, if not any express decisions, to the effect that monopolies were not only invalid but criminal. In the very earliest cases the word "monopoly" was little used except with reference to franchises granted by the state.<sup>7</sup> The common-law offenses were grouped

<sup>1</sup> 18 R. I. 484.

<sup>2</sup> See also *Alger v. Thacher*, 19 Pick. (Mass.) 51, 54 (1837); *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110 (1900).

<sup>3</sup> 115 Cal. 16.

<sup>4</sup> See *Brown & Allen v. Jacobs Pharmacy Co.*, 115 Ga. 429, 437; *Harding v. American Glucose Co.*, 74 Am. St. Rep. 268, 269, note.

<sup>5</sup> Fish, J., in *Brown & Allen v. Jacobs Pharmacy Co.*, 115 Ga. 429, 437.

<sup>6</sup> *U. S. v. Addystone Pipe & Steel Co.*, 85 Fed. 271.

<sup>7</sup> See, for example, *Case of Monopolies*, 11 Co. 84 b.



under the terms engrossing, regrating, and forestalling, but later these terms, ceased to be frequently used, and the term "monopoly" came into use as a term, always of great opprobrium, and sometimes with the declaration that it constituted a criminal offense.<sup>1</sup>

Here reference may be made to the recent Illinois case of *Chicago, Wilmington, & Vermillion Coal Co. v. People*.<sup>2</sup> This was an indictment for fixing and regulating the price of coal in the State of Illinois, and two of the counts were said to be based upon the common law, although the others were expressly based upon the Illinois statute, which was sufficiently broad to support the common-law counts also.<sup>3</sup> The case came before the court upon the indictment and an agreed statement of facts which showed a very widespread combination which regulated prices and sought to control the selling end of the business to a large extent. The court upheld the common-law counts as well as the others. The lower court based its decision upon the following ground:

"A combination between independent producers of coal to prevent competition in the sale of that article, which is a necessary of life, is an act inimical to trade and commerce, and detrimental to the public and unlawful, and amounts to a common-law conspiracy, regardless of what may be done in furtherance of the conspiracy."

The upper court rests its decision in part upon the *dictum* in *State v. Buchanan*, to the effect that "every conspiracy to do an unlawful act . . . for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense." It is not clear, however, whether the court rests its conclusion on the unlawfulness of the act or the prejudicial character of the purpose. It is true

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<sup>1</sup> See Parker, J., in 1 P. Wms. 181, 193 (1711), who said, "It can never be useful to restrain another from trading in all places, though it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime." See also remarks of counsel in *King v. Waddington*, 1 East 167; *Strait v. Harrow Co.*, 18 N. Y. Supp. 224, 233; *Raymond v. Leavitt*, 46 Mich. 447; *State v. Eastern Coal Co.*, 29 R. I. 254; 27 Cyc. 891.

<sup>2</sup> 114 Ill. App. 75, 214 Ill. 421.

<sup>3</sup> This statute was as follows: "If any corporation . . . shall create, enter into or become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons to regulate and fix the price of any article of merchandise or commodity . . . such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to indictment and punishment as provided in this act."

that, according to the well-established definitions, a conspiracy to do an unlawful act is criminal. But the court does not show in what the unlawfulness of the act consists, for to fix and regulate prices is not unlawful, as the court admits, for an individual. If the court means unlawful for a combination, the definition as already shown is useless; the argument is an argument in a circle, and the reasoning is clearly fallacious. If, however, the court bases its conclusion on the prejudicial character of the purpose, it rests upon an assumption not established by legal decisions. It cannot yet be said that the courts would hold criminal every conspiracy that has a "tendency to prejudice the public in general." It is true that a conspiracy would not be criminal unless it prejudiced the public, because this is the test of criminality; but it is quite a different thing to say that every act that, in any degree, has a tendency to prejudice the public would necessarily be held to be criminal. So far, therefore, as this Illinois case assumes to pass upon the common law, it cannot be said to be based upon sound reasoning.<sup>1</sup>

Furthermore, there are strong intimations in the decisions that combinations or agreements in restraint of trade are not criminal at common law. Thus Judge Taft said, in the case of *United States v. Addystone Pipe & Steel Company*:<sup>2</sup>

"Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void and were not enforced by the courts."

The true distinction between actionable combinations or agreements and those which were merely void or not enforceable, based upon well-established principles of the common law, is also well stated in *Brown & Allen v. Jacobs Pharmacy Co.*,<sup>3</sup> where the court said:

"Or suppose that a number of merchants should agree to fix the price of certain goods, and not to sell below that price; if there were no statute

<sup>1</sup> This case was decided before the decision in *State v. Eastern Coal Co.*, 29 R. I. 258, and was commented upon in the latter case but not followed.

<sup>2</sup> 85 Fed. 271, 279. See also *In re Greene*, 52 Fed. 104, 111; *Wheeler Stenzel Co. v. National Window Glass Association*, 152 Fed. 864, 873; *Bowen, L. J.*, in *Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. D. 598, 619; *Hannen, J.*, in *Farrer v. Close*, L. R. 4 Q. B. 602, 612 (1869); *State v. International Harvester Co.*, 79 Ark. 517; *Walsh v. Dwight*, 58 N. Y. Supp. 91, 93. Cf. *Knight & Jillson Co. v. Miller*, 87 N. E. 823, 828 (Ind., 1909).

<sup>3</sup> 115 Ga. 429, 437 (1909).



on the subject, and the case rested on the common law, the agreement would simply be non-enforceable; but if they went further, and agreed that, if any other merchant sold at a less price, they would force him to their terms, or drive away those dealing with him, by violence, threats, or boycotting, it would cease to be a mere non-enforceable contract, and if, in its execution, damages proximately resulted to such other merchant, he would have a right of action."

In Kentucky it has been squarely held that it is not an indictable offense at common law to combine for the purpose of maintaining rates of insurance.<sup>1</sup>

It has even been doubted whether the old common offenses of engrossing, regrating, and forestalling would now be considered criminal in this country. Judge Story, for example, said:<sup>2</sup>

"These three prohibited acts are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider that they would not now be held to be against public policy."

While the contrary view seems, perhaps, to be the more prevalent one, no reported case in this country has been found upholding a criminal prosecution upon the ground that either one of these offenses had been committed.

To summarize the law in this country, therefore, it may be said:

(1) That the courts will not hold a conspiracy criminal *merely* on the ground that it has a tendency to prejudice the public; the purpose or means must be shown to be civilly or criminally illegal.

(2) There is not, under the decisions up to this time, any well-recognized crime known as a criminal conspiracy in restraint of trade, that is, *sui generis*, which will be held to be criminal when it does not come within the ordinary definitions.

(3) So far as combinations in restraint of trade are criminal at all, they divide themselves into not more than four classes: (a) combinations made criminal by certain old English statutes, and these are not generally regarded as being now in force in the United States; (b) combinations which are criminal by reason of illegality of purpose or means; (c) possibly combinations coming within the defini-

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<sup>1</sup> *Ætna Insurance Co. v. Commonwealth*, 106 Ky. 864.

<sup>2</sup> Story on Sales, § 490; see also Black's Law Dictionary; *State v. Eastern Coal Co.*, 29 R. I. 260.

tions of forestalling, regrating, or engrossing, but it is doubtful if these are now in force in this country, and they certainly are not to their full extent; (d) according to *dicta*, rather than decisions, combinations to create *monopolies* of necessities of life. Clearly the most usual forms of agreements among dealers in commodities to fix and regulate prices, when the prices are not unreasonable, the means used are not illegal, and the parties to the agreement do not comprise all the dealers in the community, do not come within any of the above classes.

If monopolies of necessities of life are to be held criminal at common law, many difficulties at once suggest themselves. How are necessities to be determined? What constitutes a monopoly and how wide in extent must it be?<sup>1</sup> Is the question of reasonableness of the rates to be considered in determining whether the monopoly is criminal?<sup>2</sup> Are other questions of reasonableness and unreasonableness to enter in?

The difficulties of framing any fair rule or definition brings one inevitably to the conclusion that the best solution of the problem is to say, with Judge Taft, that trade agreements are not punishable under the rules of the common law, and then to look to the legislature to pass adequate and definite measures to protect the public. Clearly some combinations, both of labor and capital, should be restrained or punished. It is intolerable that dealers in the necessities of life should have the power to extort exorbitant profits from the consumer by any means whatever. The demands of labor are often un-

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<sup>1</sup> For example, an agreement among all the dealers of a single city is held not to amount to a monopoly. *Kellogg v. Larkin*, 3 Pinn. (Wis.) 123. Nor does an agreement by twenty salt dealers, although a large proportion of all the dealers in a province, constitute a monopoly. *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant's Ch. (Can.) 540. On the other hand it has been said, in civil cases, that it is not necessary that all the dealers in a certain community should be in a combination in order to constitute a monopoly. See *Nester v. Brewing Co.*, 161 Pa. St. 473, 481, where the court said: "The application of the rule does not depend upon the number of those who may be implicated, or to the extent of space, included in the combination." In *Richardson v. Buhl*, 77 Mich. 632, 658, the court said: "All combinations among persons or corporations for the purpose of regulating or controlling the price of merchandise, or any of the necessities of life, are monopolies and intolerable." Cf. definition of monopoly in *Black's Law Dictionary*, quoted in 29 R. I. 260.

<sup>2</sup> The question as to the reasonableness or unreasonableness of the prices established has been considered of importance in several cases. See *Skrainka v. Scharinghausen*, 8 Mo. App. 522; *Herriman v. Menzies*, 115 Cal. 16; *Manchester & Lawrence R. Co. v. Concord R. Co.*, 66 N. H. 100; *Commonwealth v. International Harvester Co.*, 115 S. W. 703, 712 (Ky., 1909).



reasonable and impose hardship, not only on the employer and the purchaser of the products of labor, but upon the laboring men themselves. A remedy is necessary, but an adequate one cannot be found in the common law as it has, up to this time, developed. The criminal law, in particular, should be definite and exact, and not be made to depend upon the shifting economic opinions of the courts. For these reasons legislation, not the common law, should, in cases relating to business agreements, define the crime as well as impose the penalty.

*Arthur M. Allen.*

PROVIDENCE, R. I.

# HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER

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CONSTITUTIONAL LIMITATIONS ON THE POWER OF A STATE OVER FOREIGN CORPORATIONS. — Under the federal constitution a state cannot exclude from its territory a foreign corporation desiring to engage in interstate commerce.<sup>1</sup> It would seem, however, that such a corporation can be prevented from carrying on its intrastate business,<sup>2</sup> while a corporation purposing solely an intrastate business can be entirely excluded.<sup>3</sup> As a corollary of the latter rule, conditions may be attached to entrance into the state;<sup>4</sup> the corporation may be ejected if it removes a suit to the federal court;<sup>5</sup> and it may be compelled to submit, as a condition precedent to its entry, to the payment of a license fee based upon its property outside the state,<sup>6</sup> on which it has a constitutional right not to be taxed.<sup>7</sup> Therefore, when it was sought to oust the local business of two foreign corporations, long engaged in interstate commerce within the state, because the

<sup>1</sup> Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1; Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727; Crutcher v. Kentucky, 141 U. S. 47.

<sup>2</sup> Pullman Co. v. Adams, 189 U. S. 420; Allen v. Pullman's Palace Car Co., 191 U. S. 171.

<sup>3</sup> Pembina Consolidated Silver & Mining & Milling Co. v. Pennsylvania, 125 U. S. 181; Hooper v. California, 155 U. S. 648; Waters Pierce Oil Co. v. Texas, 177 U. S. 28; National Council v. State Council, 203 U. S. 151.

<sup>4</sup> Paul v. Virginia, 8 Wall. 168. An entry under such conditions forms a contract which the state cannot impair. American Smelting Co. v. Colorado, 204 U. S. 103.

<sup>5</sup> Doyle v. Continental Insurance Co., 94 U. S. 535; Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246. But a corporation cannot contract not to remove a cause to the federal court. Barron v. Burnside, 121 U. S. 186; Southern Pacific Co. v. Denton, 146 U. S. 202.

<sup>6</sup> Horn Silver Mining Co. v. New York, 143 U. S. 305.

<sup>7</sup> Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; Galveston, Harrisburg, & San Antonio Railway Co. v. Texas, 210 U. S. 217.



corporations refused to pay a tax on their entire capital stock as a condition of their doing, or seeking to do, business within the state, the statute levying this tax was held unconstitutional not without a vigorous dissent. *Western Union Co. v. Kansas*, 216 U. S. 1; *The Pullman Co. v. Kansas*, 216 U. S. 54. Cf. *State of Arkansas v. Western Union Telegraph Co.*, 30 Sup. Ct. 280.<sup>8</sup> Likewise, against authority,<sup>9</sup> one justice took the position, that the exclusion of the intrastate business of a foreign corporation, engaged also in interstate business, is a direct clog on interstate commerce. Undoubtedly the court recognized the coercive effect of this statutory use of the lawful powers of the state with an unreasonable condition attached.<sup>10</sup> But it is submitted that the dissenting opinion presents the only logical conclusion to be deduced from the cases above considered, in which the power to oust the local business was not defeated because the broken condition was the waiver of a constitutional right.

It was argued that, as a corporation is a person within the meaning of the Fourteenth Amendment,<sup>11</sup> and as these corporations had been doing business within the state, the statute was in conflict with that amendment.<sup>12</sup> But the due process clause has never been considered as limiting the power of the state over the property of foreign corporations doing a purely local business.<sup>13</sup> However, another recent decision on an Alabama statute, similar to those above considered, holds that a foreign corporation is entitled to the equal protection of the laws. *Southern Railway Co. v. Green*, 30 Sup. Ct. 287. Necessarily, therefore, the corporation in question was considered to be within Alabama.<sup>14</sup> But the Supreme Court has rigidly adhered to its early *dictum* that a corporation cannot exist outside the jurisdiction of the law that created it,<sup>15</sup> although deciding that at common law it can acquire rights and liabilities extra-territorially through its agents.<sup>16</sup> In the Kansas and Arkansas cases the corporations were acting in this manner, but the corporation in the Alabama case had previously complied with certain statutory requirements, such as the usual stipulations of consent to being sued. Thus, as the law now stands, the compliance with any statutory requirements places the corporation within a foreign jurisdiction;<sup>17</sup>

<sup>8</sup> This case gives relief by injunction against a similar statute.

<sup>9</sup> *Pullman Co. v. Adams*, *supra* (evidence that the interstate business did not pay, excluded).

<sup>10</sup> The effect of conditions attached to the entry of foreign corporations has been held unlawful: the privileges of citizens of other states cannot be destroyed (*Blake v. McClung*, 172 U. S. 239); nor can a contract between a corporation and a third person be impaired (*Bedford v. Eastern Building & Loan Association*, 181 U. S. 227); nor a contract with the state (*Erie R. R. Co. v. Penn.*, 153 U. S. 628). Cf. *American Smelting Co. v. Colorado*, *supra*.

<sup>11</sup> *U. S. v. Amedy*, 11 Wheat. (U. S.) 392.

<sup>12</sup> The liberty of artificial persons is not protected under this amendment. *Northwestern Life Insurance Co. v. Riggs*, 203 U. S. 243; *Western Turf Association v. Greenberg*, 204 U. S. 359. *Quære*, as to the life of a corporation.

<sup>13</sup> *Horn Silver Mining Co. v. New York*, *supra*. (The corporation in this case had been doing business within the state.)

<sup>14</sup> "No state shall . . . nor deny to any person *within its jurisdiction* the equal protection of the laws." Constitution of the United States, Amendment XIV.

<sup>15</sup> *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 588. Cf. *Horn Silver Mining Co. v. New York*, *supra*, 314.

<sup>16</sup> *Bank of Augusta v. Earle*, *supra*. The numerous cases in state courts are collected in BEALE, *FOREIGN CORPORATIONS*, § III, n. 2.

<sup>17</sup> See as to the effect of non-compliance with statutory conditions, 22 HARV. L. REV. 593.

but if it acts under the common law, the corporation has not yet left the state of incorporation.<sup>18</sup>

All the difficulty over these constitutional questions arises from theoretical views advanced by the Supreme Court; to say that a corporation cannot migrate, and to speak of excluding a foreign corporation from a state, leads to confusion of thought. It is submitted that the power of a state to create domestic corporations and limit their powers is of the same nature as the power to refuse to recognize the existence, or limit the powers of, foreign corporations; that is, the power of a sovereign over corporate action.<sup>19</sup> If this is so, since the state can admittedly exact any condition, even a so-called unconstitutional one, as a prerequisite to incorporation,<sup>20</sup> it may attach any condition to the legalizing of corporate action within its territory by a foreign corporation.<sup>21</sup> And, moreover, as soon as the state has legalized corporate action, the corporation on which it has thus acted is a person within the jurisdiction. Therefore the Kansas and Arkansas cases cannot be supported on any ground,<sup>22</sup> while the Alabama case is but a new extension of the Fourteenth Amendment.

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CONTROL OF DIRECTORS OF A CORPORATION UNDER A PARTNERSHIP AGREEMENT BETWEEN STOCKHOLDERS. — Since a corporation can act only through individuals, directors are elected to manage the corporate affairs, in whom the powers of the corporation are usually vested by statute or charter.<sup>1</sup> Only a few corporate acts of a fundamental nature, such as an increase in the shares of stock or a change in the business of the corporation, require assent by the stockholders.<sup>2</sup> The directors become, however, the agents of the corporation and not of its individual members.<sup>3</sup> It is apparent, therefore, that any control by stockholders over corporate acts must be exercised indirectly, either by the election of the directors, or through the courts.<sup>4</sup> In matters of judgment or business policy the directors may act uncontrolled by the courts;<sup>5</sup> but where they are about to commit

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<sup>18</sup> The latter point was decided in *National Council v. State Council*, *supra*, in which it was said of such corporations: "Those within the jurisdiction in such a sense, as they ever can be said to be within it, do not acquire a right not to be turned out except by general laws." And *cf.* *St. Clair v. Cox*, 106 U. S. 350.

<sup>19</sup> Substantially decided in the Alabama case, since the distinction between taxing a domestic corporation for being a corporation and taxing a foreign corporation for the privilege of doing business within the state was held an arbitrary classification.

<sup>20</sup> *Ashley v. Ryan*, 153 U. S. 436.

<sup>21</sup> If the Supreme Court had adopted this view, it would have allowed the state to exclude a corporation engaged in interstate commerce. The entire subject was thus one for Congress, not the courts. See 23 HARV. L. REV. 456, 463.

<sup>22</sup> But *cf.* 23 HARV. L. REV. 441, 450.

<sup>1</sup> *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373, 379; *Rollins v. Clay*, 33 Me. 132, 139; *Hutchinson v. Green*, 91 Mo. 367.

<sup>2</sup> *Chicago Railway Co. v. Allerton*, 18 Wall. 233; *Stokes v. Continental Trust Co.*, 186 N. Y. 285.

<sup>3</sup> *Smith v. Hurd*, 12 Met. (Mass.) 371.

<sup>4</sup> *Flynn v. Brooklyn City Railway Co.*, 158 N. Y. 493; *Cann v. Eakins*, 23 Nova Scotia, 475; *Dana v. Bank*, 5 Watts & S. (Pa.) 223, 247. *Pullman Car Co. v. Missouri Pacific Railway Co.*, 115 U. S. 587, 596.

<sup>5</sup> *Automatic Self Cleaning Co. v. Cunningham*, 22 T. L. R. 378; *McCloskey v. Snowden*, 212 Pa. 249.



a breach of trust, waste the corporate assets, do an act *ultra vires* the corporation, or act without the stockholders' assent in matters requiring it, equity will grant an injunction at the instance of a stockholder.<sup>6</sup> In the case of foreign corporations the prevailing doctrine seems to be that whenever the stockholder seeks in his derivative right, for the benefit of the corporation, to enjoin the directors, equity should refuse to intermeddle in the internal affairs of such corporation; and this although the threatened wrong be one which in the case of a domestic corporation would be enjoined.<sup>7</sup> The reason for the doctrine is that the corporation, which is a formal party to the suit, is not before the court, so that the merits of the case cannot be fully ascertained.<sup>8</sup> But where it is possible to get jurisdiction over the foreign corporation so that the merits can be determined, there would seem to be no valid objection to affording relief whenever necessary to do full justice. And the tendency is to grant the injunction when the directors are within the jurisdiction and when the subject-matter of the threatened wrong relates to property within the state.<sup>9</sup> When, however, the complaint relates merely to the business policy of the foreign corporation, the courts should refuse to take jurisdiction.<sup>10</sup> In a recent case it was held that where two men owned all the stock in a foreign corporation under an agreement that dummy directors should manage the business according to their joint directions, one of them could not restrain the directors from acting otherwise than according to the partnership agreement. *Jackson v. Hooper*, 42 N. Y. L. J. 2381 (N. J., Ct. Ch., Feb. 28, 1910).

Equity will sometimes disregard the corporate fiction in favor of third parties.<sup>11</sup> But where a stockholder has joined in making use of the corporate device, it is clear that he has no equity to establish a partnership.<sup>12</sup> As the court aptly remarks, stockholders "cannot be partners *inter se* and a corporation as to the rest of the world." The decision may also be said finally to have laid the ghost of the theory, urged unsuccessfully in a leading English case, that a corporation may be regarded as a mere agency of the stockholders if such be their purpose.<sup>13</sup> Their purpose is quite immaterial and the courts will look only to the effect of incorporation.<sup>14</sup> Since, therefore, there was no ground for disregarding the corporate fiction, the court was clearly right in refusing to allow the judgment of the directors to be controlled by a partnership agreement.

<sup>6</sup> *Dodge v. Woolsey*, 18 How. 331; *Sears v. Hotchkiss*, 25 Conn. 171; *Gregory v. Patchett*, 33 Beav. 595; *Chicago Railway Co. v. Allerton*, *supra*. Where the stockholder's right is purely a derivative one, he must allege that the corporation has refused to sue. *Flynn v. Brooklyn City Railway Co.*, *supra*.

<sup>7</sup> *Condon v. Mutual Reserve Association*, 89 Md. 99; *McCloskey v. Snowden*, *supra*; *Ludlow v. Dutch Rhenish Railway Co.*, 21 Beav. 43. *Contra*, *Pickering v. Stephenson*, L. R. 14 Eq. 322.

<sup>8</sup> *Stockley v. Thomas*, 89 Md. 663. *Cf.* *State ex rel. Watkins v. North American Land Co.*, 106 La. Ann. 621, 634.

<sup>9</sup> *Richardson v. Clinton Wall Co.*, 181 Mass. 580; *Harding v. American Glucose Co.*, 182 Ill. 551, 637. *Cf.* *Hallenberg v. Greene*, 66 N. Y. App. Div. 590, and *Marshall's Valve Gear Co. v. Manning*, 25 T. L. R. 69.

<sup>10</sup> *MacDougal v. Gardiner*, 45 L. J. Ch. 27; *Hartley v. Welsch*, 23 Pa. Co. Ct. 78.

<sup>11</sup> *Beal v. Chase*, 31 Mich. 490. See 23 HARV. L. REV. 216.

<sup>12</sup> *Russell v. McLean*, 14 Pick. (Mass.) 63; *Einstein v. Rosenfeld*, 38 N. J. Eq. 309.

<sup>13</sup> *Salomon v. Salomon*, L. R. [1897] App. Cas. 22.

<sup>14</sup> *Pullman Car Co. v. Missouri Pacific Ry. Co.*, *supra*.

CONVERSION OF PARTNERSHIP REALTY INTO PERSONALTY. — However doubtful its right at law, a firm may in equity be the owner of realty, the legal title being held by one or more partners in trust for the firm.<sup>1</sup> On the basis of this equitable recognition of the firm as an entity, it would seem that the character of a partner's right in firm realty is dependent, not upon any fiction of conversion of realty into personalty, but rather upon a determination whether the firm owned the entire title, or had merely, during the firm existence, the use of the property with a power of sale for firm purposes.<sup>2</sup> In the former case, the partner's right is not to any specific property, but merely to an accounting; and being thus a mere chose in action, it should be governed in its descent and transfer by the rules applicable to personalty.<sup>3</sup> But if the firm has only the use of the property, the individual partner's interest in remainder in the unconsumed realty is a right in realty, and must be governed in its descent and transfer by the rules applicable to real estate.<sup>4</sup>

The courts have, however, worked out the rights of the partners and of their representatives on the basis of an implied trust to sell for firm purposes. In England, in the absence of agreement to the contrary, there is an implied agreement that all property shall be sold in winding up the firm. This is held in equity to deprive the partner of any real interest in land owned by the firm, regardless of the state of the legal title, and is generally spoken of as "out and out conversion."<sup>5</sup> In this country, the presumed agreement is that the realty shall be sold only so far as may be necessary for firm purposes.<sup>6</sup> There are two views as to the effect of this. (1) The partner has no specific interest in firm realty until it is determined that the land is not needed for firm purposes.<sup>7</sup> (2) The land remains that of the partners as individuals, but may be sold so far as is necessary to satisfy firm needs.<sup>8</sup> Either of these views sustains the holding of a recent case that there may be partition of firm realty not needed in the settlement of firm accounts, and that the heirs or devisees of a deceased partner may bring the bill. *Schleissner v. Goldsticker*, 120 N. Y. Supp. 333 (Sup. Ct., App. Div.). As to the right to demand an exoneration of the firm realty by the personalty, there is some conflict.<sup>9</sup>

<sup>1</sup> *Hartnett v. Stillwell*, 121 Ga. 386; *Henry v. Anderson*, 77 Ind. 361; *Shanks v. Klein*, 104 U. S. 18.

<sup>2</sup> Cf. Beale's note, *PARSONS ON PARTNERSHIP*, 4 ed., 360; *Smith v. Smith*, 5 Ves. 188.

<sup>3</sup> See *LINDLEY, PARTNERSHIP*, 7 ed., 381; 22 HARV. L. REV. 400. Cf. *Menagh v. Whitwell*, 52 N. Y. 147.

<sup>4</sup> See *Rowley v. Adams*, 7 Beav. 548; *Balmain v. Shore*, 9 Ves. 500.

<sup>5</sup> *Darby v. Darby*, 3 Drew. 495. The Partnership Act of 1890 (53 & 54 Vict., c. 39, § 22, provides that, "where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners," and also as between the heirs and executors of a deceased partner, as personal estate.

<sup>6</sup> *Shearer v. Shearer*, 98 Mass. 107. For examples of agreements between the parties which were held to replace the presumed agreement, see *Patrick v. Patrick*, 71 N. J. Eq. 347; *Hughes v. Allen*, 66 Vt. 95.

<sup>7</sup> *Woodward-Holmes Co. v. Nudd*, 58 Minn. 236; *Coolidge v. Burke*, 69 Ark. 237. In the latter case it was held that realty, bought with firm personalty by the surviving partner in the course of winding up the firm, descended as realty.

<sup>8</sup> *Shearer v. Shearer*, *supra*. See *Young v. Thrasher*, 115 Mo. 222.

<sup>9</sup> See *Logan v. Greenlaw*, 25 Fed. 299 (no exoneration); *Foster's Appeal*, 74 Pa. St. 391 (exoneration); *Walling v. Burgess*, 122 Ind. 299 (exoneration).



While almost all American courts agree that this claim to the residuary realty descends as realty, many refuse to recognize it as a present right in real estate,<sup>10</sup> and hold that a partner's interest in a firm owning realty may be transferred as personality,<sup>11</sup> that the wives have no inchoate right of dower,<sup>12</sup> and that judgments against the individual partners do not affect their interest in firm realty.<sup>13</sup> In explaining these decisions the courts have advanced the doctrine that the partner's interest is personality during the firm's existence, and is not reconverted into realty until it is determined that it will be unnecessary to sell the land in winding up the firm. Such a result seems opposed to the cases which decide that the nature of a *cestui's* right for purposes of descent is determined at his decease.<sup>14</sup> Furthermore, it is of doubtful propriety where no writing evidences such an agreement.<sup>15</sup>

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SUIT UNDER FOREIGN STATUTE GIVING THE "PERSONAL REPRESENTATIVE" THE RIGHT TO RECOVER FOR DEATH BY WRONGFUL ACT. — It is established by the weight of authority that, as a general rule, suit may be brought in a foreign jurisdiction upon a cause of action arising under a statute giving damage for death by wrongful act.<sup>1</sup> As the obligation sued on is raised wholly by the statute of the place where the injury occurred, that statute governs as to the party to bring suit.<sup>2</sup> When the statute gives the right of action to the "personal representative" of the deceased, inasmuch as there may be different administrators in different jurisdictions, a further question arises as to which administrator should sue.

Perhaps the most probable intent of a legislature in using the phrase "personal representative" is to designate the representative appointed in its own state; that is, in the *locus delicti*, since such a statute applies only to death caused within the jurisdiction.<sup>3</sup> Certainly no case has arisen in which a court, in construing its own statute, has so interpreted it as to deny a right of action to the administrator of the *locus delicti*;<sup>4</sup> and in this, as in other cases of statutory interpretation, the construction given to a statute by the courts of the jurisdiction in which the statute was passed should be

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<sup>10</sup> But see *Shearer v. Shearer*, *supra*; *Hewitt v. Rankin*, 41 Ia. 35.

<sup>11</sup> *Greenwood v. Marvin*, 111 N. Y. 423; *Morril v. Colehour*, 82 Ill. 618; *Marsh v. Davis*, 33 Kan. 326.

<sup>12</sup> *Woodward-Holmes Co. v. Nudd*, 58 Minn. 236.

<sup>13</sup> *Meily v. Wood*, 71 Pa. St. 488. But see *Hewitt v. Rankin*, *supra*.

<sup>14</sup> See *In re Raw*, 26 Ch. D. 601; *Carr v. Collins*, 7 Jur. 165; *Harding v. Trotter*, 1 W. R. 502. See PARSONS, PARTNERSHIP, 4 ed., 361 n; 23 HARV. L. REV. 70. It cannot properly be said that the surviving partner has an uncontrolled discretion as to the sale of firm realty. See *Young v. Thrasher*, 115 Mo. 222.

<sup>15</sup> The courts, however, are generally not troubled by the absence of a writing. See *Marsh v. Davis*, *supra*; *Buckley v. Doig*, 188 N. Y. 238.

<sup>1</sup> *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593. See 3 HARV. L. REV. 116-125; 16 HARV. L. REV. 63.

<sup>2</sup> *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206. But see *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445. The latter case is criticised in *Williams v. Camden Interstate Ry. Co.*, 138 Fed. 571.

<sup>3</sup> *Hall v. Southern Ry. Co.*, 146 N. C. 345.

<sup>4</sup> In some cases it is held that an administrator may be appointed in the *locus delicti* for the purposes of bringing suit under these statutes even though the deceased has left no assets in that jurisdiction. *In re Mayo's Estate*, 60 S. C. 401.

governing.<sup>5</sup> Granting, however, that the administrator of the *locus delicti* may sue, this interpretation does not necessarily exclude all others. Thus courts have construed their own statutes as also allowing the domiciliary administrator to sue, although the domicile and the *locus delicti* are not coincident.<sup>6</sup> But if either or both of these interpretations were adopted as excluding others, it would be impossible to sue in many foreign jurisdictions. For the rule that letters of administration, granted in one state, will not be recognized elsewhere, which precludes an administrator from suing, as such, in a foreign jurisdiction, has been held to apply to an administrator suing under these statutes.<sup>7</sup> This seems, however, to be a wrong application of the rule. The common statute giving an action for death by wrongful act, copied after Lord Campbell's Act, creates a new cause of action, so that the administrator suing under it is not enforcing a claim which has survived to him from his intestate;<sup>8</sup> he is suing as trustee for named beneficiaries, and not as administrator of the deceased.<sup>9</sup> But whether wrongfully applied in this connection or not, this rule is doubtless the cause of frequent holdings that the administrator of the jurisdiction in which action is brought is a proper plaintiff under these statutes, even though he has not, previous to the suit, been appointed administrator, either in the jurisdiction where the injury took place or at the domicile of the deceased.<sup>10</sup>

In no cases to this effect, however, was the court construing its own statute; but the meaning of such decisions would seem to be at least an implied assent by the court that the statute of its own jurisdiction should receive a similar construction at the hands of foreign courts. Certainly such a construction, although it may seem somewhat forced, reaches a fair result. In the recent New York case of *Pietraroia v. New Jersey and Hudson River Ry. & Ferry Co.*, 42 N. Y. L. J. 2123, the court adopted this construction, while dismissing the suit on the ground that the plaintiff had been appointed administrator solely for the purpose of getting the suit into the New York courts. But this qualification seems to be merely an extension of the somewhat exceptional New York doctrine that in the absence of special circumstances jurisdiction will not be taken of a suit between foreigners as to a foreign tort.<sup>11</sup>

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**PRESCRIPTION BETWEEN STATES.** — Following the maxim, *nullum tempus occurrit regi*, it is a well settled principle of common law that lapse of time does not bar the sovereign from enforcing his rights.<sup>1</sup> As successors

<sup>5</sup> *Fowler v. Lamson*, 146 Ill. 472. See 2 SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., § 319.

<sup>6</sup> *Robertson v. Chicago, St. Paul, Minneapolis, & Omaha Ry. Co.*, 122 Wis. 66. *Contra*, *Hall v. Southern Ry. Co.*, *supra*.

<sup>7</sup> *Brooks v. Southern Pacific Co.*, 148 Fed. 986.

<sup>8</sup> See 15 HARV. L. REV. 854.

<sup>9</sup> For these reasons the foreign administrator was allowed to sue in *Connor v. New York, New Haven, & Hartford R. R. Co.*, 28 R. I. 560; *Boulden v. Pennsylvania R. R. Co.*, 205 Pa. St. 264; *Kansas Pacific Ry. v. Cutter*, 16 Kans. 568.

<sup>10</sup> *Dennick v. Railroad Co.*, 103 U. S. 11; *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48; *In re Lowham's Estate*, 30 Utah 436.

<sup>11</sup> *Collard v. Beach*, 93 N. Y. App. Div. 339. See 19 HARV. L. REV. 618.

<sup>1</sup> See ANGELL, LIMITATIONS, 6 ed., pp. 30-36; *Case of Magdalen College*, 11 Co. 66 b, 74 b.



to the rights of the British sovereign in America, this principle was held applicable to the federal<sup>2</sup> and state<sup>3</sup> governments. Consequently title to land belonging to the government cannot be acquired by adverse possession,<sup>4</sup> nor easements by prescription.<sup>5</sup> The true reason for the rule seems to be that the property of the public should not be lost through the negligence of its agents.<sup>6</sup> But obviously this is not applicable in the converse case when the government is itself seeking to establish the adverse right; accordingly it has been held that a state can acquire title by adverse possession against a private individual.<sup>7</sup>

Under these conditions, an interesting question arises as to the effect of a lapse of time on conflicting claims to territory by two sovereigns. As between nations, this point has of course never been adjudicated, owing to the lack of a tribunal possessing the necessary authority. The writers on international law, however, concur in the opinion that the uninterrupted occupation of territory by one nation for a long period of time should exclude the claim of every other.<sup>8</sup> Undoubtedly long acquiescence by two adjoining landowners as to a certain boundary will preclude either from disputing it;<sup>9</sup> and it is said that there are even stronger reasons for recognizing such a rule between nations, owing to the more serious consequences which their failure to reach a peaceful settlement will entail.<sup>10</sup> The soundness of this proposition can hardly be questioned. It has remained, however, for the formation of the United States by the federation of a number of sovereign states, to afford an opportunity for adjudication upon it by a court of law. In all disputes between the states concerning territory, the Supreme Court has recognized this rule, and has held that boundaries between them can be established by long acquiescence.<sup>11</sup> The usual reasons for allowing the acquisition of rights by prescription are emphasized; namely, the undesirability of resurrecting ancient claims, and the presumption that no just claim would be neglected.<sup>12</sup> The objection that the establishment of a boundary in this way must rest on the fiction of an im-

<sup>2</sup> *United States v. Hoar*, 2 Mason 311.

<sup>3</sup> *Stoughton v. Baker*, 4 Mass. 527, 528; *People v. Gilbert*, 18 Johns. (N. Y.) 227; *Troutman v. May*, 33 Pa. St. 455. As to the extension of the exemption to municipalities and railway companies, see 15 HARV. L. REV. 146.

<sup>4</sup> *Oaksmith's Lessee v. Johnston*, 92 U. S. 343; *Armstrong v. Morrill*, 14 Wall. (U. S.) 120, 144. *Contra*, *Crooker v. Pendleton*, 23 Me. 339.

<sup>5</sup> *Perry v. Eames*, [1891] 1 Ch. 658; see *Penn. R. Co. v. Freeport*, 138 Pa. St. 91. But see *Benest v. Pipon*, 1 Knapp 60, 68.

<sup>6</sup> *United States v. Hoar*, *supra*. Another reason given is that the Crown is so occupied with the public welfare that it is unable to assert its rights within the limited time allowed to subjects. See 1 BLACKSTONE, COMMENTARIES, 247.

<sup>7</sup> *Eldridge v. City of Binghamton*, 120 N. Y. 309. Cf. 17 HARV. L. REV. 55. As to the acquisition of easements by the public, see 19 HARV. L. REV. 55. In many jurisdictions a special period is fixed by statute, within which certain claims of the government must be pressed. See *People v. Trinity Church*, 22 N. Y. 44; *Nichols v. City of Boston*, 98 Mass. 39; *Goodtitle v. Baldwin*, 11 East 488.

<sup>8</sup> See VATTÉL, LAW OF NATIONS, Bk. II, § 149; WHEATON, INTERNATIONAL LAW, § 164; 1 OPPENHEIM, INTERNATIONAL LAW, § 243.

<sup>9</sup> *Boyd v. Gaves*, 4 Wheat. (U. S.) 513; *Kellogg v. Smith*, 7 Cush. (Mass.) 375. See 12 HARV. L. REV. 356. This has also been held to be true of a boundary between two towns. *Chenery v. Waltham*, 8 Cush. (Mass.) 327.

<sup>10</sup> See VATTÉL, LAW OF NATIONS, Bk. II, § 149.

<sup>11</sup> *Rhode Island v. Massachusetts*, 4 How. (U. S.) 591; *Louisiana v. Mississippi*, 202 U. S. 1, 53.

<sup>12</sup> *Rhode Island v. Massachusetts*, *supra*.

plied grant, which would amount to a treaty between two states and therefore be unconstitutional, has not prevailed.<sup>13</sup>

On the authority of these precedents the Supreme Court in a recent decision has settled a dispute concerning the boundary between Maryland and West Virginia. *The State of Maryland v. The State of West Virginia*, U. S. Sup. Ct., Feb. 21, 1910. The facts in the principal case, however, distinguish it from the precedents which it professes to follow, as the government of Maryland had made repeated attempts to have the boundary changed so as to conform with the original grant from the Crown. Although the decision, therefore, cannot rest on the presumption of a grant arising from long acquiescence, it is nevertheless fully justified by the inconvenience which a different conclusion would have caused to private landowners, who had long made the *de facto* line a basis for conveyances of land. Furthermore it is entirely consistent with what is submitted to be the true basis for the doctrine of prescription; namely, protection to long occupation under a claim of right, rather than punishment for neglect to enforce rights.

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EXPRESS CONDITIONS AGAINST SUICIDE IN LIFE INSURANCE. — In insuring a life, an underwriter may except death resulting from certain epidemics or from the hazards of certain occupations. So he may contract that he will not be liable in case of suicide; and unless contrary to a statute,<sup>1</sup> or too vague in its terms,<sup>2</sup> the stipulation will be given effect. This is true whether the life or some third person is the real party in interest.<sup>3</sup> The earliest form of such stipulation was an express condition that the policy was to be void in case the insured should "commit suicide."<sup>4</sup> Because conditions in an insurance policy are harsh in their operation and are expressed in the language of the underwriter, a person skilled in the use of technical terms, they are construed strictly against him. Accordingly, it is generally held that the word "suicide," without more, means criminal suicide, and does not include self-killing as a result of insanity.<sup>5</sup> Such a conclusion is most easily reached when the condition against suicide is associated with others against death by duelling and at the hands of justice; for then the maxim *noscitur a sociis* can be applied. But neither this condition nor conditions against "death by his own hand," or "suicide, sane or insane," will prevent recovery when the insured is the accidental, though negligent, cause of his own death; as, for instance, when he is killed by the accidental discharge of a gun in his own hands,<sup>6</sup> or by taking an overdose of medicine.<sup>7</sup>

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<sup>13</sup> See *Indiana v. Kentucky*, 136 U. S. 479, 514.

<sup>1</sup> *Knight Templars', etc. Co. v. Jarman*, 187 U. S. 197.

<sup>2</sup> *Jacobs v. National Life Ins. Co.*, 1 McArthur (D. C.) 632.

<sup>3</sup> See *Mutual Life Ins. Co. v. Kelly*, 114 Fed. 268. Sometimes, however, the policy expressly provides that the interest of third parties shall not be affected by suicide. *Solicitors', etc. Society v. Lamb*, 2 De G., J. & S. 251.

<sup>4</sup> *Garrett v. Barclay*, 5 M. & G. 643 n. The policy was effected in 1812.

<sup>5</sup> *Central, etc. Ass'n v. Anderson*, 195 Ill. 135; *Conn. Mutual, etc. Co. v. Akens*, 150 U. S. 468. *Contra*, *Cooper v. Mass., etc. Co.*, 102 Mass. 227. One who intentionally took his own life, although unable to judge between right and wrong, was held to have violated this condition in *Clift v. Schwabe*, 3 C. B. 437. But the authority of the case may well be doubted. See SUGDEN, *LAW OF PROPERTY*, 75.

<sup>6</sup> *Union Mutual Life Ins. Co. v. Payne*, 105 Fed. 172.

<sup>7</sup> *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317.



In this country, the phrase "die by his own hand" in an express condition has generally been construed in the same way as "commit suicide."<sup>8</sup> In England, and a few American jurisdictions, however, the courts have interpreted it as covering self-killing by one unable to understand the moral nature of his act;<sup>9</sup> but most of these jurisdictions will doubtless allow recovery on a policy in this form when the fatal act is induced by an insane irresistible impulse, or is done without knowing that it will result in death.<sup>10</sup>

To protect themselves from these adverse decisions, insurance companies have adopted different expedients. One is to insert in the policy an express condition against "suicide, sane or insane" — a form almost everywhere construed as covering self-killing caused by any form of insanity.<sup>11</sup> But natural as this interpretation seems, a few cases have nevertheless allowed recovery where the insured was so utterly bereft of reason that he did not know the physical results of his acts, and hence could not have intended to take his own life.<sup>12</sup> Such is the doctrine of a recent Kentucky case. *Inter-Southern Life Insurance Co. v. Boyd*, 124 S. W. 333 (Ky.).

A second expedient is to use, instead of an express condition, a warranty by the insured that he will not commit suicide, sane or insane. The law implies a condition that if the warranty is broken the underwriter need not pay. So, in the few cases that have arisen, a warranty against suicide has been given the same effect as an express condition in the corresponding form.<sup>13</sup> Warranties are, like conditions, phrased by the underwriter in fact; but unlike conditions, they are, in theory, the language of the insured. And although that is not a sufficient reason for construing warranties less strictly against the underwriter than conditions, yet it might well be seized upon as ground for a distinction by courts which have been over strict in interpreting conditions.

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PARTIAL REVOCATION OF WILLS BY ACTS DONE TO THE INSTRUMENT. — Where a testator has attempted to revoke a part of his will, two distinct questions arise: (1) Can there be partial revocation at all? (2) If so, under what conditions? It is almost universally provided that there may be partial revocation by a subsequent attested instrument; and by both the English Statute of Frauds and the Wills Act a clause might also be revoked by certain acts done to the instrument.<sup>1</sup> Similar statutes exist to-day in a

<sup>8</sup> *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. (Tenn.) 567; *Life Ins. Co. v. Terry*, 15 Wall. (U. S.) 580.

<sup>9</sup> *Borradaile v. Hunter*, 5 M. & G. 639; *Van Zandt v. Mutual Benefit Life Ins. Co.*, 55 N. Y. 169. The word "hand" is not taken literally. To end one's own life by jumping into the river violates this condition. *Borradaile v. Hunter*, *supra*.

<sup>10</sup> *Breasted v. Farmers', etc. Co.*, 8 N. Y. 299.

<sup>11</sup> *Seitzinger v. Modern Woodmen of America*, 204 Ill. 58; *Haynie v. Knight Temp-lars', etc. Co.*, 139 Mo. 416.

<sup>12</sup> *Metropolitan Life Ins. Co. v. Thomas*, 106 S. W. 1175 (Ky.); *Cady v. Fidelity & Casualty Co.*, 134 Wis. 322.

<sup>13</sup> *Ellinger v. Mutual Life Ins. Co.*, [1905] 1 K. B. 31; *Mutual Life Ins. Co. v. Kelly*, *supra*.

<sup>1</sup> 1 Vict. c. 26, § 20; *Swinton v. Bailey*, 4 App. Cas. 70; *Larkins v. Larkins*, 3 B. & P. 16.

number of states.<sup>2</sup> Where, however, the statute makes no express provision, some courts have construed the legislative silence to prohibit partial revocation by act done to the will,<sup>3</sup> while in others the opposite result has been reached.<sup>4</sup> In jurisdictions where the first question is answered in the affirmative, the court must determine at the outset whether the act of revocation was intended as a partial or total revocation of the will.<sup>5</sup> And it is usually held that an erasure of the seal, signature, or other formal part of the will works a total revocation.<sup>6</sup>

Where the statutory permission to revoke a will in part exists, it becomes necessary in answering the second question to determine what is the effect of the revocation. It is axiomatic that a testator must not reserve the power to make a testamentary disposition without the required formalities.<sup>7</sup> Hence, although a revocation resulting merely in an annulment of a gift is unobjectionable, yet where its effect would be to create new interests under the will, the original will should be probated.<sup>8</sup> Whether or not the revocation of a clause creates new interests is often a close question of construction. If the only result is to cause a partial intestacy, or to decrease a beneficiary's share, it is properly held that there is no new gift to the heirs or next of kin, for they take, not under the will, but by succession.<sup>9</sup> The revocation may, however, enlarge the residuary gift; and this has been held to create a new disposition.<sup>10</sup> But the more liberal view of the majority is that the residuum is a "catch-all" gift and that the increase passes under a properly attested clause.<sup>11</sup> This view was followed without discussion in the recent decision of *In re Frothingham's Will*, 74 Atl. 471 (N. J. Ct. App.). And a like result has been reached where the increase was due to a revocation in the residuary clause itself.<sup>12</sup> In a more doubtful decision the erasure of the name of one of several joint-tenants was upheld, on the theory that the others thereby acquired no new interest.<sup>13</sup> Where, however, the revocation is of an exception from a larger devise, or turns a life estate into a fee, it clearly creates a new interest, and is invalid.<sup>14</sup>

The doctrine of dependent relative revocation applies to partial revocations, but the courts sometimes confuse the two.<sup>15</sup> The former concedes that there was a revocation but permits it to be construed away to effectuate the testator's supposed intention;<sup>16</sup> whereas the theory of partial

<sup>2</sup> *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383; *Gardiner v. Gardiner*, 65 N. H. 230; *Eschbach v. Collins*, 61 Md. 478; *Varnon v. Varnon*, 67 Mo. App. 537.

<sup>3</sup> *Lovell v. Quitman*, 88 N. Y. 377; *Law v. Law*, 83 Ala. 432. In some states partial revocation is forbidden or required to be attested. *Richardson v. Baird*, 126 Ia. 408; *Giffin v. Brook*, 48 Oh. St. 211.

<sup>4</sup> *Bigelow v. Gillott*, 123 Mass. 102. See *Miles' Appeal*, 68 Conn. 237.

<sup>5</sup> *Brown's Will*, 1 B. Mon. (Ky.) 56; *Dancer v. Crabb*, L. R. 3 Prob. & Div. 98.

<sup>6</sup> *Succession of Muh*, 35 La. Ann. 394; *Townshend v. Howard*, *supra*.

<sup>7</sup> *Eschbach v. Collins*, *supra*; *Miles' Appeal*, *supra*.

<sup>8</sup> *Home of the Aged v. Bantz*, 107 Md. 543.

<sup>9</sup> *Swinton v. Bailey*, *supra*; *Home of the Aged v. Bantz*, *supra*.

<sup>10</sup> *Miles' Appeal*, *supra*.

<sup>11</sup> *Bigelow v. Gillott*, *supra*; *Collard v. Collard*, 67 Atl. 190 (N. J.).

<sup>12</sup> *Estate of Wells Tomlinson*, 133 Pa. 245; *Larkins v. Larkins*, *supra*. The obliteration of a condition attached to a gift has similarly been upheld. *Richardson v. Baird*, *supra*.

<sup>13</sup> *Larkins v. Larkins*, *supra*.

<sup>14</sup> *Pringle v. McPherson*, 2 Brev. (S. C.) 279; *Eschbach v. Collins*, *supra*.

<sup>15</sup> *Gardiner v. Gardiner*, *supra*.

<sup>16</sup> *Onions v. Tyrer*, 2 Vern. 742.



revocation is that there can be no revocation in the first place when its effect would be to create a new gift. Hence it would seem that, even though the attempted partial revocations are so numerous as to indicate that the testator would rather have died intestate than to allow the unaltered will to stand, the original instrument should be probated.<sup>17</sup>

INDEMNIFICATION OF CRIMINAL BAIL AS A CRIMINAL CONSPIRACY. — The private persons to whose custody as bail a prisoner is yielded up are compelled by the state to give bond, not because the state is willing to take that sum in the prisoner's stead, but because the fear of pecuniary loss will give bail a more lively sense of their duty.<sup>1</sup> If the sureties are indemnified against the absconding of the prisoner by a contract with, or a deposit by, any third party, the state still has some one who, through fear of pecuniary loss, will assume the duty of producing the prisoner.<sup>2</sup> But if the prisoner himself indemnify the bail or their indemnifiers, the state has virtually but the prisoner's own recognizance, plus the naked promise of bail. For this reason a promise by the prisoner of general indemnification of bail is not implied;<sup>3</sup> and an express promise is unenforceable.<sup>4</sup> Yet bail are not disqualified because the prisoner has agreed beforehand to indemnify them,<sup>5</sup> nor has any decision been found that depositing the amount of the bond with the bail is a crime on the part of the prisoner.

A recent decision in England has, for the first time, held that a contract by the prisoner generally to indemnify bail is a criminal conspiracy, even though the bail acted innocently, with no intent to allow the prisoner to abscond and thus to hamper justice. *Rex v. Porter*, 26 T. L. R. 200 (Eng., Ct. Crim. App., Dec. 17, 1909). A criminal conspiracy is a combination of two or more to do something unlawful either as a means or as an ultimate end.<sup>6</sup> A crime is unlawful in this sense;<sup>7</sup> but if a completed indemnification, a deposit, is not a crime, *a fortiori* the contract cannot be criminal as being an agreement to commit a crime. The act to be done, however, need not be a crime: any unlawfulness of greater public concern than a trivial private wrong may be enough.<sup>8</sup> A contract of indemnity is unlawful in the civil sense of being unenforceable,<sup>9</sup> but cannot upon this ground alone be considered criminal. But it may well be said that when a contract, ordinarily merely unenforceable, becomes the means through which two or more intend to do something to the prejudice of the community, a criminal conspiracy exists.<sup>10</sup> Thus agreements tending to interfere with the administration of government have been held criminal.<sup>11</sup>

<sup>17</sup> But *cf. In re Knapen's Will*, 75 Vt. 146.

<sup>1</sup> *Cripps v. Hartnoll*, 4 B. & S. 414. See 22 HARV. L. REV. 530.

<sup>2</sup> *People v. Ingersoll*, 14 Abb. Pr. N. S. 23. See 22 HARV. L. REV. 530.

<sup>3</sup> *Jones v. Orchard*, 16 C. B. 614.

<sup>4</sup> *Herman v. Jeuchner*, 15 Q. B. D. 561.

<sup>5</sup> *Rex v. Broome*, 18 L. T. O. S. 19; *Reg. v. Badger*, 4 Q. B. N. S. 468.

<sup>6</sup> *U. S. v. Benson*, 70 Fed. 591, 594. The main case accepts this definition.

<sup>7</sup> See MAY, CRIMINAL LAW, 3 ed., 171-172.

<sup>8</sup> *Rex v. Turner*, 13 East 228; *Rex v. Pywell*, 1 Stark. 402. See MAY, CRIMINAL LAW, 3 ed., 171-172.

<sup>9</sup> *Herman v. Jeuchner*, *supra*.

<sup>10</sup> *Rex v. Brailsford*, [1905] 2 K. B. 730; *Rex v. Higgins*, 2 East 5, 21.

<sup>11</sup> *Rex v. Mawbey*, 6 T. R. 619 (agreement to present false testimony); *Rex v.*

Contracts to indemnify bail might be regarded as criminal conspiracies on two grounds. (1) It is said that their inevitable tendency is to make bail careless and allow the prisoner easily to abscond.<sup>12</sup> But the authorities seem sound in holding that the tendency is really not so inevitable as to condemn the contract on that ground.<sup>13</sup> (2) An agreement to cheat has been held criminal;<sup>14</sup> and if a contract to indemnify bail is to be deemed necessarily a conspiracy to cheat the state into a virtual release of the prisoner on his own recognizance, then surely it must be criminal. If the unlawful act contemplated must, in its inevitable consequences, be prejudicial to the community, an intent to do that act is a sufficient evil intent.<sup>15</sup> If, however, the act contemplated is not, for either of the reasons given, sufficiently harmful, a wrongful intent must be distinctly found as a fact.<sup>16</sup> It is submitted that in the main case the unlawful act is not so closely bound up with the possible consequential harm to the community,<sup>17</sup> that the intent to do that act is necessarily an evil one, even in the face of a jury finding that no evil consequences were in fact intended.

## RECENT CASES.

**ADVERSE POSSESSION — AGAINST WHOM TITLE MAY BE GAINED — ESTABLISHMENT OF STATE BOUNDARY BY LAPSE OF TIME.** — In 1788 a line was surveyed and marked as the boundary between Maryland and Virginia. Maryland disputed the correctness of the line, and between 1820 and 1830 carried on unsuccessful negotiations with Virginia to have it corrected. In 1859 it had another line surveyed and made repeated attempts to have this accepted as the boundary. The original line was always treated as the boundary by private land-owners, and the two states exercised their jurisdiction with reference to it. In 1891, Maryland filed a bill to have the Supreme Court settle the dispute. *Held*, that the original line must be established as the boundary. *The State of Maryland v. The State of West Virginia*, U. S. Sup. Ct., Feb. 21, 1910. See NOTES, p. 555.

**ALIENS — NATURALIZATION — "FREE WHITE PERSONS."** — A Syrian applied for naturalization. *Held*, that he should be admitted. *In re Najour*, 174 Fed. 735 (Circ. Ct., N. D. Ga.).

An Armenian applied for naturalization. *Held*, that he should be admitted. *In re Halladjian*, 174 Fed. 834 (Circ. Ct., D. Mass.).

The phrase "free white person" has run the entire gamut of the naturalization laws. ACT MARCH 26, 1790, c. 3, § 1 U. S. STAT. AT L. 103; ACT FEB. 18, 1875, c. 80, U. S. COMP. ST. (1901), § 2169. Its temporary omission in 1873 was probably an inadvertence. See *In re Saito*, 62 Fed. 126. Since the abolition of slavery the word "free" is mere surplusage. The word "white" has proved a fruitful source of argument. To the scientific mind at the time the first statute was drafted

Steventon, 2 East 362 (to prevent the attendance of witnesses); *Rex v. Sterling*, 1 Lev. 126 (to impoverish the excise men and diminish the king's revenue).

<sup>12</sup> But see *Rex v. Stockwell*, 66 J. P. 376 (Cent. Crim. Ct., 1902).

<sup>13</sup> *Rex v. Broome*, *supra*; *Reg v. Badger*, *supra*.

<sup>14</sup> *Curley v. U. S.*, 130 Fed. 1. See MAY, CRIMINAL LAW, 3 ed., 173.

<sup>15</sup> *Rex v. Brailsford*, *supra*.

<sup>16</sup> *People v. Flack*, 125 N. Y. 324. See MAY, CRIMINAL LAW, 3 ed., 173.

<sup>17</sup> *Rex v. Stockwell*, *supra*.



"white" meant Caucasian, as distinguished from Mongolian or yellow, Ethiopian or black, American or red, Malay or brown — following Blumenbach's classification in 1781. Accordingly, naturalization has been denied Chinese, Japanese, Burmese, Kanakas, and Canadian Indians. *In re Ah Yup*, 5 Sawy. (U. S.) 155; *In re Saito, supra*; *In re Po*, 7 N. Y. Misc. 471; *In re Kanaka Nian*, 6 Utah 259; *In re Burton*, 1 Alaska 111. Anomalously, a "pure-blooded Mexican" has been naturalized. *In re Roderiguez*, 81 Fed. 337. No half-breed is a "white person." *In re Knight*, 171 Fed. 299. It has been doubted whether the early statutes were intended to include the complex groups of Western Asiatics. *In re Balsara*, 171 Fed. 294. To classify them now according to the ethnological standards of a century ago is impracticable. From the groupings of early censuses, and from certain modern statutory definitions, however, it is arguable that the term was merely a "catch-all" for others than negroes and Indians. See U. S. REV. STAT. (1878) § 2206; ARKANSAS, DIG. OF STATS. § 6632. Then as Mongolians and Malays are excluded by judicial construction, all Europeans and Asiatics not allied to these races are presumably eligible.

**BANKRUPTCY — DISSOLUTION OF LIENS — MONEY BORROWED TO GIVE PREFERENCE.** — Shortly before bankruptcy, an insolvent assigned to the defendant certain accounts to secure advances then made to him, and used the money to pay favored creditors. The defendant, when advancing the money, had cause to know the insolvent intended to prefer creditors therewith. The trustee in bankruptcy sought to have the assignment set aside as fraudulent. *Held*, that this is not a fraudulent assignment. *Van Iderstine v. National Discount Co.*, 174 Fed. 518 (C. C. A., Second Circ.).

It seems clear that the words of § 67 e of the Bankruptcy Act of 1898, "intent to hinder, delay, or defraud," were meant to have the same artificial construction as in the statute of 13 Elizabeth. *In re Bloch*, 142 Fed. 674. *Contra, In re McLam*, 97 Fed. 922. And since that statute did not include preferences, this section should not affect transactions preferential in intent. *Cf. Blackmore v. Parkes*, 81 Fed. 899. Yet in several cases, the courts, in order to discourage preferences, have held transfers similar to the one attacked in the principal case void under this provision. *Roberts v. Johnson*, 151 Fed. 567. *Cf. Ex parte Mendell*, 1 Low. (U. S.) 506. Independently of this section the desired result might sometimes be attained, for transactions intended to promote illegality are often invalid. *Hull v. Ruggles*, 56 N. Y. 424. And though at common law a preference was legal, it defeats the aim of bankruptcy statutes and is therefore improper. *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438. See 15 HARV. L. REV. 829, 834, 843. And any court willing to strain the statutes to prevent a preference would probably regard it as serious enough to taint the whole conduct of those who by advancements knowingly make it possible. But actual knowledge of the preferential intent is required; and reasonable cause to anticipate such a result is not sufficient to taint the transaction. *Cf. Adams v. Couliard*, 102 Mass. 167. Hence the principal case seems sound.

**BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — SEAT IN STOCK EXCHANGE AND CLAIMS DUE ON FLOOR TRANSACTIONS.** — Under the rules of the Consolidated Stock Exchange of New York, an insolvent member's seat is to be sold, his floor transactions closed out, and the proceeds appropriated to the payment of (1) indebtedness to the exchange, (2) claims arising out of transactions on the floor, and (3) loans from members. *Held*, that a trustee in bankruptcy takes these proceeds subject to the rules of the exchange, and must give priority to exchange creditors in the order named. *In re Gregory*, 174 Fed. 629 (C. C. A., Second Circ.).

A seat in a stock exchange is property which, on the bankruptcy of the member, passes to his trustee. *Page v. Edmunds*, 187 U. S. 596. But since membership is a personal privilege, created by vote of the exchange, that body may

attach thereto any conditions it chooses, and the trustee in bankruptcy takes subject to those conditions. *Hyde v. Woods*, 94 U. S. 523. Claims arising from transactions on the exchange, however, are contract rights: their value is not derived from any action of the board. Hence, it is submitted, the board cannot control the distribution of the money realized on such claims, contrary to the provisions of the Bankruptcy Act. *Cohen v. Budd*, 52 N. Y. Misc. 217. Obviously the fact that the parties may have contracted with reference to such a rule of the exchange is immaterial. A contract whereby A agrees to buy stock from B, and in the event of B's bankruptcy to pay C so much of the purchase price as may be owing by B to C, is clearly opposed to the policy and the letter of the Bankruptcy Act.

**BANKRUPTCY — SET-OFF AND COUNTERCLAIM — NO SET-OFF AGAINST AMOUNT DUE ON UNPAID STOCK SUBSCRIPTIONS.** — The trustee in bankruptcy of a corporation filed a bill in equity to compel payment by the stockholders of subscriptions to the capital stock. The stockholders pleaded as a set-off the amount to which they were entitled as bondholders on a foreclosed mortgage. Section 68 of the Bankruptcy Act of 1898 allows set-off in all cases of "mutual debts or mutual credits." *Held*, that the set-off is not available. *Babbitt v. Read*, 23 Am. B. R. 254 (Circ. Ct., S. D., N. Y.).

The right of set-off between solvent parties is given to prevent cross actions; its object in bankruptcy is to do substantial justice. See *Forster v. Williams*, 12 M. & W. 191, 203. But this difference in purpose has not led to any extension of the doctrine under bankruptcy acts. See *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 622. The debts and credits must be due in the same right and capacity. *Wright v. Rogers*, 30 Fed. Cas. 692. Thus a debt due to one as executor cannot be set off against a debt due from him individually. *Bishop v. Church*, 3 Atk. 691. By the weight of authority there is no right to set off joint or partnership debts against individual debts or *vice versa*, in the absence of special circumstances. *In the Matter of Van Allen*, 37 Barb. (N. Y.) 225. *Contra, In re Carrier*, 39 Fed. 193. And one who holds only the bare legal title to a note given by a bankrupt cannot set off against it a debt which he owes to the bankrupt individually. *In re Lane*, 14 Fed. Cas. 1069. The capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. See *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 620. And so in the principal case the debts are not due in the same right. See *Bausman v. Kinnear*, 79 Fed. 172.

**CONFLICT OF LAWS — CONTRACTS — INTERPRETATION.** — Under a compromise of a contested Massachusetts will, a settlement was made for a minor by which a sum was retained in trust with the provision that if she died before the expiration of the trust, the fund should go to her "heirs at law." All the parties to the settlement were then domiciled in Massachusetts. The infant's domicile was later changed to New York and she there died. *Held*, that the Massachusetts law must determine who are the "heirs at law." *Brandeis v. Atkins*, 90 N. E. 861 (Mass.).

When a contract is made in one jurisdiction to be performed in another, the cases are in great conflict as to what law governs its validity. But when a will or deed or simple contract is conceded to be valid, the cases are in substantial harmony as to what law shall govern the interpretation of the words used. The question is really one of fact: What did the parties using them intend? See *Lincaln v. Perry*, 149 Mass. 368, 373. In an insurance policy the word "heirs," as designating the beneficiaries, is commonly interpreted under the law of the insured's domicile. *Knights Templars, etc., Aid Ass. v. Greene*, 79 Fed. 461. When by a will property is devised to the heirs of a person domiciled abroad, the heirs are determined under the law of the testator's domicile. *In re Fergusson's Will*, [1902] 1 Ch. 483. And if persons domiciled in different jurisdictions contract,



using a form of words in common mercantile use in one of the countries, the law of that country is the one by which they are interpreted. *London Assurance v. Companhia de Moagens*, 167 U. S. 149. The issue in each instance is what the words meant to the person from whom they emanated, and this it seems is usually solved by the law of the speaker's domicile.

**CONFLICT OF LAWS — CORPORATIONS — POWER OF COURT TO DECREE ASSESSMENTS UPON FOREIGN POLICY-HOLDERS IN DOMESTIC CORPORATIONS.** — A New York railway took out policies of mutual casualty insurance in a Pennsylvania corporation. The rate of premium was fixed subject to a power in the directors of the insurer to levy an additional *pro ratâ* assessment. Upon the insolvency of the corporation, the Pennsylvania court decreed a fixed assessment upon all policy-holders. The receiver sued the defendant in New York for the amount of the assessment. *Held*, that the plaintiff can recover. *Stone v. Penn Yan, K. P. & B. Ry.*, 90 N. E. 843 (N. Y.).

The question at issue was the propriety of the procedure by which the defendant's obligation was enforced. A judgment without personal jurisdiction cannot have extra-territorial force. *Cf. Penmoyer v. Neff*, 95 U. S. 714. The procedure adopted in the principal case is analogous to that frequently employed to enforce a statutory liability against non-resident stockholders of a corporation. *Casey v. Galli*, 94 U. S. 673; *Bernheimer v. Converse*, 206 U. S. 516. A bill in equity is brought against the corporation in its home state by creditors. In this action the court investigates the assets and liabilities of the corporation and fixes the assessment which shall be made upon the stockholders. The decree does not purport to bind any stockholder individually. Thereafter the receiver must sue the stockholder separately in the state of his domicile. The latter may deny that he is a stockholder, or plead other defenses such as the statute of limitations of the forum. *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329. But he cannot question the amount of the assessment. *Howarth v. Lombard*, 175 Mass. 570; *Bernheimer v. Converse*, *supra*. By voluntarily assuming an obligation in a foreign state, the stockholder — and in the present case the insured — consents to have the extent of the obligation determined by that state. See 23 HARV. L. REV. 37.

**CONFLICT OF LAWS — LEGITIMACY AND ADOPTION — LEGITIMATION SUBSEQUENT TO BIRTH.** — A New York man deserted his wife and purported to marry a New Jersey woman who bore him two children. Thereafter he became domiciled with his family in Michigan, there obtained a divorce from his New York wife by default without personal service, and went through a second marriage ceremony with the New Jersey woman. By Michigan law illegitimate children became legitimate by the subsequent marriage of their parents. The children claimed New York realty under a devise as the "lawful issue" of their father. A decree of the New York court denied recognition to the Michigan divorce and second marriage. *Held*, that the federal Constitution does not require New York to recognize the children as lawful issue. *Olmsted v. Olmsted*, U. S. Sup. Ct., Feb. 21, 1910.

For a criticism of this case in the state court, see 20 HARV. L. REV. 400.

**CONFLICT OF LAWS — OBLIGATIONS EX DELICTO: CREATION AND ENFORCEMENT — STATUTE GIVING PERSONAL REPRESENTATIVE RIGHT TO SUE FOR DEATH BY WRONGFUL ACT.** — X, domiciled in New Jersey, was killed by the negligence of the defendant, a New Jersey corporation. The plaintiff was appointed administrator in New York solely for the purpose of bringing suit in the New York courts. The New Jersey statute gives a right of action for death by wrongful act to the personal representative of the deceased. *Held*, that, inasmuch as there was no *bonâ fide* administration in New York, the New York courts will not entertain jurisdiction. *Pietraroia v. New Jersey and Hudson River Ry. & Ferry Co.*, 42 N. Y. L. J. 2123 (N. Y., Ct. App., Feb. 8, 1910). See NOTES, p. 554.

**CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — PRIVACY BETWEEN DIFFERENT REPRESENTATIVES OF SAME DECEDENT.** — The plaintiff obtained a judgment on a note made by the decedent against the domiciliary executor in Michigan. He then brought an action on this judgment against the administrator *cum testamento annexo* of the same decedent in California, after the original claim was barred by the short statute of limitations. *Held*, that the Michigan judgment is not only not the basis of an action, but is not even evidence against the California administrator. *Richards v. Blaisdell*, 106 Pac. 732 (Cal., Ct. App.).

Where a decedent leaves property in several states, authority to deal with it must be obtained from the sovereign of the *situs*, and letters testamentary have no legal force beyond the territorial jurisdiction of such sovereign. *Dixon v. Ramsey*, 3 Cranch (U. S.) 319. Since the property in each state is thus treated as an independent estate, the doctrine of the principal case that a judgment against one representative is not evidence against another in a different state, is in accordance with authority and principle. *Stacy v. Thrasher*, 6 How. (U. S.) 44. It is applied though the same person is administrator in both states. *Johnson v. Johnson*, 63 Hun (N. Y.) 1. A distinction is made in case a testator has appointed two executors in different states. *Hill v. Tucker*, 13 How. (U. S.) 458. See *Garland v. Garland*, 84 Va. 181; *Carpenter v. Strange*, 141 U. S. 87. It is said that there is privity between such executors, for while the authority of administrators rests solely upon appointment by a court of probate, the authority of executors is derived from the testator through the will. The distinction seems unsound, for neither the executor nor the administrator has power to act until the probate court has granted letters testamentary or letters of administration. See *Dixon v. Ramsey*, *supra*.

**CONSPIRACY — CRIMINAL LIABILITY — INDEMNIFICATION OF CRIMINAL BAIL AS A CRIMINAL CONSPIRACY.** — The defendant was indicted for a criminal conspiracy to indemnify bail against the absconding of the prisoner. The jury found that the defendant, the bail, entered the agreement of indemnity innocently, with no intent to obstruct the administration of justice or to cause his principal to abscond. *Held*, that the defendant is guilty. *Rex v. Porter*, 26 T. L. R. 200 (Eng., Ct. Crim. App., Dec. 17, 1909). See NOTES, p. 560.

**CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — APPLICATION TO FOREIGN CORPORATIONS.** — An Alabama statute taxed all foreign corporations on their capital stock. A corporation which had previously entered the state upon a compliance with certain statutory provisions, refused to pay this tax on the ground that it was not also levied on domestic corporations. *Held*, that the statute is unconstitutional. *Southern Railway Co. v. Green*, 30 Sup. Ct. 287. See NOTES, p. 549.

**CONSTITUTIONAL LAW — INTERSTATE COMMERCE — EXCLUSION OF THE LOCAL BUSINESS OF A FOREIGN CORPORATION ENGAGED IN INTERSTATE COMMERCE.** — A Kansas statute, among other stipulations, imposed a tax of a certain percentage of the capital stock on all foreign corporations seeking, or continuing to do, business within the state. For non-payment of this tax, it was sought to oust the local business of two foreign corporations that had been engaged for many years in both intrastate and interstate commerce within Kansas. *Held*, that the statute is unconstitutional. *The Western Union Co. v. Kansas*, 216 U. S. 1; *The Pullman Co. v. Kansas*, 216 U. S. 54. See NOTES, p. 549.

**CONSTITUTIONAL LAW — VESTED RIGHTS — REPEAL OF STATUTE GIVING RIGHT OF ACTION.** — A statute allowed recovery from the city for damages consequent upon the grading of certain streets under eminent domain proceedings. The statute was repealed while the plaintiff's action was pending. *Held*, that the plaintiff cannot recover. *Eltor v. City of Tacoma*, 106 Pac. 478 (Wash.).



The repeal of a statute does not affect rights which have become vested under it. *Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450. But all inchoate interests are extinguished. *Hampton v. Commonwealth*, 19 Pa. St. 329. There is no vested right in a particular remedy. *Lord v. Chadbourne*, 42 Me. 429. And the repeal of a statute creating a crime terminates all proceedings under it not prosecuted to final judgment. *Commonwealth v. Marshall*, 28 Mass. 350. But a common law cause of action is a vested right. *Dorsey v. Kyle*, 30 Md. 512. And where a statute imposes a duty a violation of which constitutes negligence, a subsequent repeal does not remove liability previously incurred. *Gorman v. McArdle*, 67 Hun (N. Y.) 484. Rights attached by statute to a contract relation are unaffected by a subsequent repeal of the statute. *McCann v. City of New York*, 52 N. Y. App. Div. 358. But the weight of authority supports the principal case in laying down the general rule that a right of action created by statute is not a vested right. *Vance v. Rankin*, 194 Ill. 625; *Globe Publishing Company v. State Bank of Nebraska*, 41 Neb. 175. It is submitted that these decisions are based on a confusion between the remedy and the right and are unsupportable on principle. If the legislature has given a remedy, it has at the same time created a right; and this right vests independently of suit or judgment. *Hunt v. Gulick*, 9 N. J. L. 205.

**CORPORATIONS — PROMOTERS — EFFECT OF CORPORATION'S ASSENT TO FRAUDULENT SALE.** — The promoters of a corporation sold to it a patent at an enormous profit. All the existing stockholders assented with knowledge of the fraud. Subsequently the plaintiffs bought stock at par from the treasury. A bill in equity was brought joining the promoters and the corporation and praying for the surrender of the stock issued to the promoters in excess of the value of the patent. *Held*, that the plaintiffs are entitled to the relief sought. *Mason v. Carrothers*, 74 Atl. 1030 (Me.).

If a promoter in selling to a corporation fails to provide an independent board of directors and disclose all material facts, he is liable in equity for all secret unfair profits. *Erlanger v. New Sombrero Phosphate Co.*, 3 A. C. 1218. But if all the shareholders assent to the sale with knowledge of the fraud, obviously the corporation cannot recover. If innocent parties have subsequently bought shares, some courts have allowed the corporation to recover in spite of its previous assent, except in cases where the subsequent issue of stock was not directly from the treasury or was not part of the original scheme of the promoters. *Old Dominion, etc. Co. v. Bigelow*, 188 Mass. 315, 203 Mass. 159. *Re British Seamless Paper Box Co.*, 17 Ch. D. 467. See 22 HARV. L. REV. 48. This remedy seems unjustifiably to disregard the corporate fiction, for it benefits the guilty as well as the innocent shareholders. *Old Dominion, etc. Co. v. Lewisohn*, 210 U. S. 206. Moreover, the exception, based on the compass of the original scheme and the issuance of the stock from the treasury, seems artificial, for there is injury and guilt equally in both cases. The principal case also seems wrong in allowing subsequent stockholders to sue, for the stockholders' rights are derivative from the corporation which is joined in the bill as a defendant, just as a recusant trustee may be joined as defendant to work out the *cestui's* rights against a third party. See *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474. It is submitted that the plaintiff's proper remedy is an action at law against the promoters for deceit, on the ground of an implied representation that approximately full value had been paid to the company for the stocks previously issued. See *Coles v. Kennedy*, 81 Ia. 360.

**CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — EFFECT OF TRANSFERS MADE TO ESCAPE LIABILITY.** — An owner of shares not fully paid up, hearing that the company was in financial difficulties, for the purpose of avoiding liability made an absolute transfer of the shares to a man of straw, not assuming any obligation to indemnify the trans-

freee. Suit was brought by the liquidator of the company to have the transfer set aside. *Held*, that the transfer is valid. *In re Discoverers' Finance Corporation, Lindlar's Case*, 45 L. J. 122 (Eng., Ct. App., Feb. 12, 1910).

This decision is undoubted law in England. Provided the transfer is absolute, it is of no consequence that it is to one known to be a man of straw, for the express purpose of ridding the transferor of his liability. *De Pass's Case*, 4 De G. & J. 544. The retention of any interest, however, makes the transfer invalid. *Budd's Case*, 3 De G. F. & J. 297. And the transferor must contribute, if the transaction is wholly colorable, leaving him under obligations to the transferee. *In re Discoverers' Finance Corporation*, [1908] 1 Ch. 141. In the United States, however, the law is quite the reverse. *Nathan v. Whitlock*, 9 Paige (N. Y.) 152. A shareholder cannot avoid liability by conveying to a man of straw. The cases emphasize the necessity of an intent to avoid liability, considering it as analogous to an intent to defraud. See *Moore v. Boyd*, 74 Cal. 167, 174. Such an intent is usually inferred from the known insolvency of the corporation or of the transferee. *Bowden v. Johnson*, 107 U. S. 251. Yet after an honest sale with no intent to defeat creditors, the mere fact of the purchaser's insolvency is not enough to make the seller liable as a contributory. *Miller v. Great Republic Insurance Co.*, 50 Mo. 55. It is submitted that the American doctrine is necessary to afford adequate protection and to do full justice to honest shareholders and creditors.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — RIGHT TO CONTROL DIRECTORS BY A PARTNERSHIP AGREEMENT. — Two individuals bought all the shares in a foreign corporation, under an agreement that the business should be carried on under their joint direction, and that the necessary directors should act only under such direction. A dispute having arisen, one of them seeks to enjoin the directors from following their independent judgment. *Held*, that the injunction be refused. *Jackson v. Hooper*, 42 N. Y. L. J. 2381 (N. J., Ct. Ch., Feb. 28, 1910). See NOTES, p. 551.

CORPORATIONS — ULTRA VIRES CONTRACTS: RIGHTS AND LIABILITIES OF PARTIES — AUTHORIZATION OF PARTICULAR ACT DEPENDING ON FACTS PECULIARLY WITHIN CORPORATE AGENT'S KNOWLEDGE. — The defendant corporation issued a promissory note for the purchase of stock in another corporation. The plaintiff purchased the note for value before maturity without notice. The defendant was authorized to issue notes, but its purchase of stock was *ultra vires*. *Held*, that the plaintiff can recover on the note. *Jefferson Bank of St. Louis v. Chapman-White-Lyons Co.*, 123 S. W. 641 (Tenn.).

Corporate notes are void if expressly prohibited. *Root v. Wallace*, 4 McLean (U. S.) 8. But otherwise in the United States a corporation has implied power to issue negotiable notes for the purposes of its business. *Curtis v. Leavitt*, 15 N. Y. 9. An issue for other purposes is unauthorized. *Tracy v. Talmadge*, 14 N. Y. 162. Usually an unauthorized act is not a corporate act unless the entire body of stockholders ratify it in fact or in law. And unless there has been a corporate act the plea of *ultra vires* is undoubtedly valid. *Central & Banking Co. v. Smith*, 76 Ala. 572. But when an act's validity depends on facts peculiarly within the knowledge of the corporate officer, the law finds a corporate act without more, and the plea of *ultra vires* is not permissible. *Monument Nat. Bank v. Globe Works*, 101 Mass. 57. So a corporation is always liable to the innocent holder of its accommodation paper. *Nat. Bank of the Republic v. Young*, 41 N. J. Eq. 531. And a hardware company has been held liable on notes issued for the purchase of jewelry. *Stouffer v. Smith-Davis Hardware Co.*, 154 Ala. 301. Nor is it any defense that a note was issued in excess of the statutory debt limit. *Humphrey v. Patrons' Mercantile Ass'n*, 50 Ia. 607. But see *Elliott Nat. Bank v. Western, etc. R. Co.*, 2 Lea (Tenn.) 676. And it is true as a general rule that unless the other party has knowledge of the facts, a corporation is liable on a contract which is authorized for one purpose but is in fact made for another purpose. See *Colorado Springs Co. v. Am. Pub. Co.*, 97 Fed. 843, 849.



**EVIDENCE — ILLEGALLY OBTAINED EVIDENCE — UNLAWFUL SEARCH OF PERSON.** — The defendant was illegally arrested and searched, on suspicion that he was implicated in a recent murder. He was found to be carrying a concealed weapon. *Held*, that evidence of this fact was improperly admitted in a trial for carrying a concealed weapon. *Jackson v. State*, 66 S. E. 982 (Ga., Ct. App.).

At common law, evidence was never excluded because illegally obtained. *Bishop Atterbury's Trial*, 16 How. St. Tr. 323, 495. And in a prior well-considered case, the Georgia Supreme Court held, in accordance with the weight of authority, that a constitutional prohibition against unreasonable searches and seizures did not alter this rule, with regard to evidence so obtained. *Williams v. State*, 100 Ga. 511. But see *Boyd v. United States*, 116 U. S. 616. The principal case, however, was put on the ground that since the evidence was conclusive of the defendant's guilt, it was equivalent to an involuntary confession, and hence inadmissible. But confessions, according to the better opinion, are excluded only when the method of obtaining them renders them unworthy of credit. See *Commonwealth v. Morey*, 1 Gray (Mass.) 461. The fact that the production of this evidence was not due to the defendant's own act is also fatal to the contention that the defendant, in spite of his constitutional privilege, was compelled to give testimony tending to incriminate himself. *Chastang v. State*, 83 Ala. 29. Consequently, if this decision is upheld, it will practically nullify the effect of the earlier ruling in the same jurisdiction. The case illustrates the tendency of the courts to favor defendants in criminal actions at the expense of settled principles of law.

**EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — EXECUTOR'S RIGHT TO REIMBURSEMENT FOR EXPENSES OF UNSUCCESSFUL CONTEST.** — The plaintiff, as executor, offered a will for probate and defended it in a contest which resulted in its disallowance. The plaintiff then sought to recover from the administrator his expenses in the probate proceedings. *Held*, that the plaintiff cannot recover. *Dodd v. Anderson*, 42 N. Y. L. J. 2189 (N. Y., Ct. App., Feb. 15, 1910).

An executor named in a will which is not admitted to probate can be reimbursed out of the estate for expenses fairly incident to his duty as proponent. See 2 WOERNER, *AMERICAN LAW OF ADMINISTRATION*, § 517. But the authorities are in conflict as to how far his duty requires him to defend the will. By some decisions an executor should merely offer the will for probate and not enter a contest of *devisavit vel non* with the heirs at law. *Brown v. Vinyard*, Bailey Eq. (S. C.) 460, 462. See *Yerkes's Appeal*, 99 Pa. St. 401. If he does defend, he must look to the devisees and legatees for his expenses. *Shaw v. Moderwell*, 104 Ill. 64, 70. See *Yerkes's Appeal*, *supra*. Other courts require an executor reasonably believing the will to be valid, to exhaust all legal means to establish it. *Lassiter v. Travis*, 98 Tenn. 330; *Henderson v. Simmons*, 33 Ala. 291; *Phillips' Ex'r v. Phillips' Adm'r*, 81 Ky. 328. The executor is here regarded as the guardian *ad litem* of the devisees. *Hazard v. Engs*, 14 R. I. 5. But that affords no reason why the heirs at law should pay the costs of an unsuccessful effort to deprive them of their property. It is submitted that the main case properly puts the burden upon those who will receive the benefit.

**INSURANCE — CONSTRUCTION AND OPERATION OF CONDITIONS — "SELF-DESTRUCTION, WHETHER SANE OR INSANE."** — A life insurance policy provided that "in the event of the death of the insured by self-destruction, whether sane or insane, . . . the liability of the company shall be only for the return of the premiums." When the insured shot himself he was so insane as not to know that he was taking his life. *Held*, that the beneficiary may recover the full amount of the insurance. *Inter-Southern Life Insurance Co. v. Boyd*, 124 S. W. 333 (Ky.). See NOTES, p. 557.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — ACTION BY COURTS PRIOR TO ACTION BY THE INTERSTATE COMMERCE COMMISSION. — A coal company brought mandamus against a carrier to compel a more equitable distribution of coal cars during a car shortage. *Held*, that the petition should be dismissed, since the Interstate Commerce Commission has not acted. *Baltimore & Ohio Railroad Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481.

For a discussion of the principles involved, see 22 HARV. L. REV. 524.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — POWER TO REGULATE PRO RATÂ DISTRIBUTION OF CARS. — The Interstate Commerce Commission ordered the defendant railroad in making its *pro ratâ* distribution of coal cars to shippers during a car famine, to include in the share of each mine owner the fuel cars of the railroad which were used to transport coal purchased at the mine by the railroad for its own use. *Held*, that the order is a proper exercise of the powers of the commission. *Interstate Commerce Com. v. Ill. Cent. Ry.*, 30 Sup. Ct. 155.

The power to regulate commerce includes the power to regulate the instruments of commerce. *Hopkins v. United States*, 171 U. S. 578, 597. The Interstate Commerce Commission has, therefore, the power to compel pro-rating of cars among shippers to prevent unjust discrimination. And in the exercise of this power it may order that the private cars of a shipper be deducted from the number of cars to which he is entitled. *United States v. B. & O. Ry.*, 165 Fed. 113. In the principal case, however, the fuel cars were being used to transport coal which already belonged to the railroad and had therefore ceased to be an article of commerce. The right of the railroad to buy from whomever it chooses is conceded by the court. So if the fuel cars were not included in the share of each mine owner, he would receive a preference merely as a coal seller. Only indirectly would coal shippers be affected, to which class alone the railroad owes a duty. Such a discrimination, however, though indirect, is none the less real. The policy of preserving free competition is perhaps a sufficient justification for the liberal interpretation of the commission's power which the decision of the principal case necessitates.

MUNICIPAL CORPORATIONS — MUNICIPAL DEBTS AND CONTRACTS — LIABILITY IN QUASI CONTRACT. — A town treasurer who paid a town obligation without any previous authority sued the town in quasi-contract for money had and received. *Held*, that he cannot recover. *Baldwin v. Inhabitants of Prentiss*, 74 Atl. 1038 (Me.).

A municipality must generally pay for the benefits received under a contract *intra vires* but void because made in an unauthorized manner. *Brown v. City of Atchinson*, 39 Kan. 37, 54; *Chelsea Savings Bank v. City of Ironwood*, 130 Fed. 410, 412. But in New England towns, since the private property of the citizens can be taken upon a judgment against the town, the powers and proceedings of the town are construed with the greatest strictness. See *Bloomfield v. Charter Oak Bank*, 121 U. S. 121; *Lovejoy v. Inhabitants of Foxcroft*, 91 Me. 367. Accordingly, the opposite result has there been reached. *Otis v. Inhabitants of Stockton*, 76 Me. 506. It is clear that the plaintiff in the principal case, having not even an apparent authority from the town, cannot recover. Fatal also to the plaintiff's quasi-contractual right is the fact that no request was made by the party unjustly enriched. *Kelley v. Lindsey*, 7 Gray (Mass.) 287; *Homestead Co. v. Valley R. R.*, 17 Wall. (U. S.) 153, 166. Although contrary to the general rule, some courts have held a request unnecessary when the action is against a private person. *Perkins v. Boothby*, 71 Me. 91, 97. Yet even these courts hold that in the case of a municipality such request is necessary to maintain an action in quasi-contract. *Otis v. Inhabitants of Stockton*, 76 Me. 506. See *Perkins v. Boothby*, 71 Me. 91, 97. In cases like the present the desire to prevent unjust enrichment is counterbalanced by the desire to protect the townspeople from unwarranted expenditure by their officials, and the comparative weight attached to one or the other element accounts for the conflict in the authorities.



**MUNICIPAL CORPORATIONS — MUNICIPAL PROPERTY — LEASE FOR PRIVATE PURPOSES.** — A town, having acquired a dock for public use, leased an ice-house occupying a portion of it to a private corporation. *Held*, that a taxpayer can compel the removal of the ice-house as an obstruction to the use of the wharf. *People ex rel. Swan v. Doxsee*, 120 N. Y. Supp. 962 (Sup. Ct. App. Div.).

A municipal corporation can sell or lease property not impressed with any public use. *Pacific Coast S. S. Co. v. Kimball*, 114 Cal. 414. And even if the city purchases and administers property for a public purpose, a lease may be made to private individuals in furtherance of the main project; thus a wharf may be leased to a warehouseman, who is compelled to offer equal facilities to all. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192. Yet if such a lease is of long duration, it has been held void. *Illinois Canal Co. v. St. Louis & the Pacific Elevator Co.*, 2 Dill. (U. S.) 70. Similarly, a portion of a park may be leased for refreshment purposes. *State v. Schweickardt*, 109 Mo. 496. But the power of a municipal corporation is more restricted when property is acquired by dedication than when it is acquired by purchase. *Village of Riverside v. MacLain*, 210 Ill. 308, 328. By well-established authority, however, a city has power to lease for other than governmental functions any portion of its public buildings not needed for its own purposes. *Worden v. New Bedford*, 131 Mass. 23; *Bell v. City of Platteville*, 71 Wis. 139. But the use of such a leased portion must not interfere with the governmental purpose. *Sugar v. City of Monroe*, 108 La. 677. This power must be regarded as an exception; for the common-law power of a municipality is wisely restricted so that no commercial use can be made of any realty dedicated to, or administered for, the public. *Contra, Huff v. Mayor and Council of Macon*, 117 Ga. 428.

**PARTNERSHIP — PARTNERSHIP PROPERTY — CONVERSION OF REALTY INTO PERSONALTY.** — A, B, and C were partners in a firm owning land, the legal title being in A, B, and C. A died. All firm accounts were settled without calling on the land. *Held*, that A's heirs may bring a bill for partition of the land. *Schleissner v. Goldsticker*, 120 N. Y. Supp. 333 (Sup. Ct., App. Div.). See NOTES, p. 553.

**PLEADING — AMENDMENT OF DECLARATION AFTER LIMITATION PERIOD.** — A Canadian statute allowed an action by "the consort and the ascendant and descendant relations" of a deceased for his death by wrongful act, if brought within a year after his death. A widow, who, as administratrix of her husband's estate, had brought an action under this statute in New York, sought, more than a year after the death, to amend her complaint so as to sue in her right as widow. Daughters of the deceased also sought to be added as parties plaintiff. *Held*, that the amendment should be allowed as to the widow but denied as to the daughters. *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316.

As the tort upon which the present action was based occurred in Canada, the Canadian Death Act fixes the nature of the right. *Kiefer v. Grand Trunk Ry. Co.*, 12 N. Y. App. Div. 28. And while the New York Statute of Limitations, as the *lex fori*, determines whether or not a remedy is barred upon the foreign right, the running of the limitation period of the Canadian Death Act extinguishes the right. An amendment changing the party plaintiff from administratrix to widow adds a new party, even when the administratrix and widow are one. *Doyle v. Carney*, 190 N. Y. 386. For the law recognizes the personal representative as distinct from the individual. *Leonard v. Pierce*, 182 N. Y. 431. Yet despite the expiration of the limitation period and the change of parties, it seems correct to have allowed this amendment. *Van Doren v. Pennsylvania R. Co.*, 93 Fed. 260. *Contra, Lower v. Segal*, 60 N. J. L. 99. N. Y. CODE CIV. PROC. § 723. The change was merely formal, for though the plaintiff sued originally as administratrix, it was for her own benefit as widow, and the defendant had ade-

quate notice of the real cause of action before the running of the statute. *Cf. Atlanta, Knoxville, & Northern Ry. Co. v. Smith*, 1 Ga. App. 162, 168. But as the daughters were entirely new parties, their joinder was properly denied.

**PUBLIC OFFICERS — COMPENSATION — RELATIVE RIGHTS OF DE JURE AND DE FACTO OFFICERS.** — A *de jure* officer of a municipal corporation sued a *de facto* officer to recover the fees incident to the office in question. *Held*, that the *de facto* officer can set off the expenses incurred in earning the fees. *Albright v. Sandoval*, 30 Sup. Ct. 318.

A *de facto* officer cannot recover any compensation for his services. *Smith v. Van Buren County*, 125 Ia. 454; *McGillic v. Corby*, 37 Mont. 249. But a *de jure* officer is given all the emoluments of his office, even if he has been working elsewhere. *Bullis v. City of Chicago*, 235 Ill. 472. But *cf. Hansen v. Mayor of Jersey City*, 71 Atl. 1116 (N. J.). Yet if the city has paid the *de facto* officer, the weight of authority denies recovery to the *de jure* officer. *Board of Commissioners of El Paso County v. Rohde*, 41 Colo. 258. *Contra, Rassmussen v. Board of Commissioners*, 8 Wyo. 277. Under such circumstances, however, the *de jure* officer can get compensation from the usurper of his office. *Kreitz v. Behrensmeyer*, 149 Ill. 496. The principal case is supported by authority in giving the rightful incumbent only the amount he would have profited by the position. *Henderson v. Kornig*, 91 S. W. 88 (Mo.); *Bier v. Gorrell*, 30 W. Va. 95. These cases evidently take as the measure of damages the injury caused by the usurpation. Although this view justifies the deduction of the expenses incident to the office, it should require the damages to include not only the fees of the office but also some recompense for the loss of a public position by the plaintiff. By what is considered the correct view, the plaintiff should recover the total salary or fees, by suit against either the city, or the usurper, as a recipient of a sum of money due to the plaintiff, for the emoluments of an office are incident to the right to the office. See 15 HARV. L. REV. 675.

**RELEASE — REQUISITES AND VALIDITY — RELEASE OF CAUSE OF ACTION VOID AT LAW BY FRAUD.** — The plaintiff, an illiterate employee of the defendant, was injured through the latter's fault. The defendant paid him wages for the time he would be incapacitated and obtained his signature to a release which the plaintiff was led to believe was merely a receipt. The plaintiff sued without tendering back the money paid him. *Held*, that the plaintiff can recover. *Herman v. P. H. Fitzgibbons Boiler Co.*, 120 N. Y. Supp. 1074 (Sup. Ct. App. Div.).

Fraud improperly inducing consent is generally considered an equitable ground for avoiding an agreement. *Smith v. Ryan*, 191 N. Y. 452; *Gould v. The Cayuga County Nat. Bank*, 86 N. Y. 75; *Thayer v. Turner*, 8 Met. (Mass.) 550. Again, fraud may lead a man to believe he is signing an instrument wholly different from the one he is in fact signing. There the fraud goes to the essence of the matter and the obligor has never in fact consented. If the signer is blind or illiterate and is thus misled as to the nature of the instrument a plea of *non est factum* is good. *Thoroughgood's Case*, 2 Coke \*9 b (444); *County of Schuylkill v. Copley*, 67 Pa. St. 386, 389. This distinction governs releases of causes of action. If the plaintiff knew he was releasing the cause of action, but was induced to do so by fraud, he must tender back the consideration and rescind the release before he can recover on the original claim. *Barker v. Northern Pac. Ry. Co.*, 65 Fed. 460; *Och v. Mo. K. & T. Ry. Co.*, 130 Mo. 27. But when the plaintiff had no intent to release and has been led to believe that the money was paid him in part satisfaction or for wages, and that the release was merely a receipt, then there is no compromise, the release is void, and therefore rescission and tender back are not necessary. *Mullen v. Old Colony Ry.*, 127 Mass. 86; *Cleary v. Municipal Electric Light Co.*, 47 N. Y. St. Rep. 172, 139 N. Y. 643; *Chicago, R. I. & Pac. Ry. Co. v. Lewis*, 13 Ill. App. 166.



RES JUDICATA — WHAT JUDGMENTS ARE CONCLUSIVE — ACQUITTAL IN CRIMINAL PROSECUTION AS BAR TO FORFEITURE OF SMUGGLED GOODS. — The United States brought a libel against rings alleged to have been smuggled by the defendant, in violation of a statute providing for criminal punishment and forfeiture of the goods. U. S. COMP. ST. (1901), § 3082. The defendant pleaded an acquittal in a criminal prosecution for smuggling these rings. *Held*, that the action for the forfeiture is barred. *United States v. Rosenthal*, 174 Fed. 652 (C. C. A., Fifth Circ.).

Where the same acts constitute a crime and also give an individual a cause of action for damages or a penalty, an acquittal in a criminal prosecution is never a bar to a civil suit. *Tumlin v. Parrott*, 82 Ga. 732. The parties not being the same in both proceedings, are not bound by the former judgment. But where the parties are the same in both cases, it is generally held that a judgment in one action makes a question *res judicata*. *United States v. A Lot of Precious Stones*, 134 Fed. 61. *Contra*, *People v. Snyder*, 90 N. Y. App. Div. 422. It might well be argued that the difference in the form of action requires an opposite rule. The libel for the goods is a civil proceeding *in rem*, and need be proved by a preponderance of evidence only, whereas to hold the defendant criminally, the jury must be satisfied beyond a reasonable doubt. *The Good Templar*, 97 Fed. 651. But the federal courts construe the statute under discussion as providing two punishments for the offense, a fine or imprisonment and a forfeiture of the goods: if the facts do not justify the defendant's undergoing one punishment, he should not be required to defend in an action for the other. *Coffey v. United States*, 116 U. S. 436.

VOLUNTARY ASSOCIATIONS — NAME OF ORGANIZATION — RIGHT TO EXCLUSIVE USE. — Some expelled members of an unincorporated Masonic order formed a corporation, adopting a name almost identical with that of the original society. The corporation sued for an injunction restraining the society from the use of its name, and the society filed a cross-bill for the same purpose. *Held*, that neither is entitled to an injunction. *Most Worshipful Grand Lodge Free, Ancient, and Accepted Masons of the District of Columbia v. Grimshaw*, 38 Wash. L. Rep. 130 (D. C., Ct. App.).

In refusing to allow discharged or seceding members of an association to deprive the original society of its established name, this decision is obviously correct. *Black Rabbit Association v. Munday*, 21 Abb. N. C. (N. Y.) 99. The cross-bill against the new corporation, however, raises a more difficult question. Although the law does not, strictly speaking, recognize property in a name, it protects trade-marks and trade-names to prevent one from reaping where another has sown. *Croft v. Day*, 7 Beav. 84. If infringement is shown, neither actual damage nor fraudulent intent need be proved. *Vulcan v. Myers*, 139 N. Y. 364. But when the question arises between non-commercial associations, the courts are less ready to grant relief. *Colonial Dames of America v. Colonial Dames of the State of New York*, 29 N. Y. Misc. 10. In several cases, however, either because of actual fraudulent intent or because of the probability of confusion, the use of a name has been enjoined. *Society of the War of 1812 v. Society of the War of 1812 in the State of New York*, 46 N. Y. App. Div. 568; *International Committee of Young Women's Christian Associations v. Young Women's Christian Association of Chicago*, 194 Ill. 194. On principle it seems impossible to draw a sharp line between commercial and non-commercial associations. There are other legitimate objects besides business, and if the public are likely to be deceived, and the work of the society interfered with, the use of a similar name by a rival organization should be enjoined. *Benevolent and Protective Order of Elks v. Improved Benevolent and Protective Order of Elks*, 118 S. W. 389 (Tenn.). *Cf. Supreme Lodge, Knights of Pythias v. Improved Order, Knights of Pythias*, 113 Mich. 133.

**WILLS — CONSTRUCTION — EXTRINSIC EVIDENCE OF LACK OF ANIMUS TESTANDI.** — In proceedings for the probate of a will, the contestant introduced evidence tending to show that the testator executed the alleged will solely to induce certain relatives to believe that he had made a will in their favor, and without really intending that it should operate as his will. *Held*, that a verdict was properly directed for the proponent. *In re Kennedy's Will*, 124 N. W. 516 (Mich.).

Following strictly the accepted rule that a will must be executed with *animus testandi*, English courts admit extrinsic evidence showing testamentary intent where the instrument is ambiguous, and conversely allow proof of its absence though the instrument unequivocally purports to be a will. *Hixon v. Wytham*, 1 Ch. Cas. 248; *Lister v. Smith*, 3 Swab. & Tr. 282. The rule is analogous to that allowing proof by parol evidence that documents purporting to be contracts or deeds were not so intended. *Pym v. Campbell*, 6 E. & B. 370; *Gudgen v. Bessel*, 6 E. & B. 986. So, too, American courts profess to require an actual *animus testandi* and allow it to be shown that the deceased did not understand the nature of the instrument signed. *Swett v. Boardman*, 1 Mass. 258. But to hold, as do several courts, that from the testator's knowledge of the purported meaning of the document which he signs, *animus testandi* is conclusively to be presumed, virtually dispenses with such a requirement. In support of this presumption it may be argued that while the English rule occasionally safeguards the wishes of one who has signed a formal document not intending it to operate as his will, it necessarily increases the possibility of overthrowing a genuine will by parol evidence. *Barnewall v. Murrell*, 108 Ala. 366.

**WILLS — CONSTRUCTION — GIFT OF INCOME TILL MARRIAGE PASSES ABSOLUTE ESTATE** — The testator devised a fund to trustees to pay the income thereof to his daughter until she should marry, with a gift over on marriage. The daughter died unmarried. *Held*, that the executor of the daughter is entitled to the *corpus* of the fund. *Mason v. Mason*, 101 L. T. R. 669 (Eng., Ch. D., Nov. 25, 1909).

A gift of the income of property, without limit as to time, is a gift of the capital, where no other disposition of the capital is made. *Phillips v. Chamberlaine*, 4 Ves. 51. It makes no difference whether the gift is made directly or through trustees. *Elton v. Shephard*, 1 Bro. Ch. 532. And that the gift of the income is subject to a conditional limitation does not prevent the legatee from having a vested interest in the capital. *Watkins v. Weston*, 3 De G. J. & S. 434. This was admitted in the principal case. The doubt was as to the extent of the legatee's interest. A gift to a woman "as long as she shall continue my widow and unmarried" passes only a life estate, for the widowhood must be determined by death. *In re Boddington*, 25 Ch. D. 685. See *Rishton v. Cobb*, 5 Myl. & C. 145, 152. Yet a gift of income to a married woman for her sole use has been held to give an absolute estate. *Haig v. Swiney*, 1 Sim. & St. 487. And so when a testator devises to his daughter until marriage, it seems reasonable to construe marriage as merely a contingency on which to determine an absolute gift. *In re Howard*, [1901] 1 Ch. 412. The daughter, having such an absolute interest in the principal case, and the happening of the divesting contingency being no longer possible, a conveyance to the executor was properly decreed. *Cavendish v. Lowther*, 3 Bro. P. C. 186; *Watts v. Turner*, 1 Russ. & M. 634.

**WILLS — REVOCATION — PARTIAL REVOCATION.** — Testator drew pencil marks through a clause of his will with the intention of revoking it, so that his wife, who was the residuary legatee, might take all. *Held*, that the revocation is valid and the revoked gift falls into the residue. *In re Frothingham's Will*, 74 Atl. 471 (N. J., Ct. App.). See NOTES, p. 558.



## BOOK REVIEWS.

THE LAW OF REAL PROPERTY. By Raleigh C. Minor and John Wurts. St. Paul: West Publishing Company. 1910. pp. lix, 959.

As stated in the preface, this work is based on Minor's two-volume treatise, reference to which appears on almost every page; the purpose of the writer being to produce a text-book on the common law of real property showing American modifications, and also such statutory changes as are of general importance. The work is primarily for the law student and not for the practitioner; and as an elementary work for students it is deserving of high praise. In language, it is invariably clear, concise, and simple; in its treatment of the many topics discussed, it is, for its purposes, adequate and practical; and it will undoubtedly be found of much assistance to the student as an adjunct to the reading of cases. Among so many topics, all well treated, it is difficult to select some one for especial commendation; but we think the sections summarizing the law on the difficult subject of fixtures (§§ 22 *et seq.*) will be found distinctly helpful to student or lawyer.

We cannot, however, subscribe to the authors' views on the power of sale mortgage, namely, that the legal recognition of the power of sale as a means of foreclosure was "unfortunate"; that its exercise is so hedged around with statutory restrictions as to be seldom resorted to; and that even then it does not preclude jurisdiction in equity to foreclose (§ 547). We cannot understand why the power of sale mortgage should now be regarded with disfavor. It affords a simple, speedy, and comparatively inexpensive means of foreclosure, which, in the long run, is quite as much to the advantage of the mortgagor as of the mortgagee; since it enables the intending mortgagor to obtain his loan on more favorable terms. And as the mortgagee, in the exercise of the power, is held strictly accountable for a due and honest regard of the rights of the mortgagor, the interests of the mortgagor, in practice, are well protected. Indeed, in this respect, it seems difficult to see why it is more objectionable than the so-called trust deeds, which the authors appear to regard with favor (§ 545); since in practice the selection of the trustee under such deed would usually be dictated by the mortgagee. As to the statement that the power of sale is seldom resorted to, it is safe to say that in Massachusetts, at least, for the last fifty years, practically every mortgage of real estate executed has contained a power of sale; and that more than ninety-nine per cent of the mortgages foreclosed during that period have been foreclosed by an exercise of the power of sale contained in them. The only statutory regulation in Massachusetts as to the exercise of the power, relates first to the length of time prior to the sale that notice thereof must be published; and secondly to the place of publication of the newspaper in which such notice is printed. Indeed, the existence of a power of sale in a mortgage appears to afford a plain, adequate, and complete remedy at law, and hence to exclude the necessity of jurisdiction in equity, except in those exceptional cases where the power of sale plainly does not furnish the mortgagee with a proper and adequate means of enforcing his rights. Though not squarely decided, this seems to be the reasonable implication of *Hallowell v. Ames*, 165 Mass. 123, and *Old Colony Trust Co. v. Great White Spirit Co.*, 178 Mass. 92.

S. H. H.

**THE LAW AND CUSTOM OF THE CONSTITUTION.** By Sir William R. Anson. In three volumes. Vol. I: Parliament. Fourth Edition. Oxford: At the Clarendon Press; London, New York, and Toronto: Henry Frowde. 1909. pp. xxvi, 404.

How far change and growth are characteristic of the constitutional machinery of England is again brought to mind by the new edition of "Parliament" in Sir William Anson's standard volumes on the "Law and Custom of the Constitution." The first edition of this particular volume, which was published in 1886, was contained in 336 pages. The new edition extends to 404 pages; and to students who are familiar with Sir William Anson's clearness and brevity of expression, and also with the detail which makes his treatise so continuously serviceable, it need not be stated that there is not a paragraph in the new edition of the volume on "Parliament" that could be deleted without obvious loss. If the treatise were to maintain its classic place the additional fifty or sixty pages were necessary, and for two reasons. Between 1886 and 1909 there were large and rich accumulations of new material helpful to an understanding of the working of the English Parliamentary system; and in that period also there were significant developments in political conditions — in the House of Commons as well as in the constituencies — of which adequate note must be taken in a treatise like that which has now so long been associated with the name of Sir William Anson.

The actual working of the present day English constitution can be studied at first hand in the main from only two sources, — the reports of the debates in the two Houses of Parliament, and the memoirs and correspondence of men who have been long and actively concerned in the working of the constitution. It is new material of the latter class that has accumulated so largely and so richly since the first edition of Sir William Anson's book was published twenty-four years ago. Queen Victoria's Letters of 1837-1861 and Morley's Life of Gladstone have both been published within this period; and these volumes alone carry more material helpful to an understanding of the cabinet and the parliamentary systems than all the memoirs that were in print at the time Sir William Anson wrote the first of the three books of his treatise. Whilst this first-hand material was thus accumulating between 1886 and 1909 great changes were in making in the political condition of England. Following the extension of the Parliamentary franchise in 1880-85 a new democracy came into being — a democracy which since then has expressed itself (1) in the increasing strength of the Irish Nationalist party; (2) by the incoming of the Labor party in the constituencies of England and in the House of Commons; and (3) by the gradual disappearance of men of the landed governing classes from cabinets which are maintained in power by Liberal majorities in the House of Commons.

Arising out of these developments English political life since 1886 has been more continuously active than at any other period in modern British history. Government has been brought nearer than ever to the people. The permanent functions of nearly all the great departments of state at Whitehall have been greatly extended; and more important perhaps than all from the standpoint of the student of the working of the constitution, pressure on Parliament arising out of this new political activity has since 1886 made necessary drastic changes in the procedure of the House of Commons. Within these twenty-four years there were greater and more far-reaching changes in procedure than were made between the beginning of the Journals in the reign of Edward VI and the reform of the House of Commons in 1832. Arising also out of these later changes in the procedure of the House of Commons and out of the developments since 1886 in the constituencies, the House of Lords to-day stands in a new attitude towards the House of Commons; so much so that reform in the constitution of the House of Lords is now demanded by both political parties; although there is and can be no agreement between the Tory and the Liberal parties as to the nature of the remodeling.



The new material of direct value to an understanding of the working of the constitution that accumulated between 1886 and 1909 has been carefully winnowed by Sir William Anson and embodied with much skill in the revised edition of his treatise; and of the changes in the working of the constitution since 1886 there is adequate and illuminating notice. Sir William Anson is generous in his acknowledgments to students working in the same field; and particularly so to authors of monographs on different sections of British constitutional machinery who are not of his countrymen. Three such books are specially acknowledged in the preface, — two from New England and one from Vienna. One of these tributes is paid to President Lowell's "admirable treatise on the Government of England, and in particular to his account of party organization in Parliamentary and municipal life."

E. P.

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- INDEPENDENT CONTRACTORS' AND EMPLOYERS' LIABILITY. By Theophilus J. Moll. Cincinnati: The W. H. Anderson Company. 1910. pp. lvi, 378.
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- COMPANY LAW. By William F. Hamilton. Third Edition. London: Butterworth and Company. 1910. pp. cxx, 557, 110.
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# HARVARD LAW REVIEW.

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VOL. XXIII.

JUNE, 1910.

NO. 8.

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## ILLEGALITY AS AN EXCUSE FOR REFUSAL OF PUBLIC SERVICE.

### I.

THE plainest basis for a refusal to render service in a public employment is illegality. Where service of the sort asked is plainly in the face of legal inhibitions, the propriety of the refusal is obvious. And if, in giving the service asked, illegality of any kind would be directly abetted, the case is hardly less plain. Where, however, the matter involved is rather *contra bonos mores* than prohibited by explicit law a doubtful problem arises. And where the illegality alleged is remote from the service requested, a still more difficult question is presented.

### II.

Obedience to executive orders constitutes, perhaps, the most obvious head of justification for refusal to serve, although considered at large it is of the same obligation from whatever branch of the government the command proceeds — legislative, judicial or executive. The most striking example of this is that executive action which is on a parity with the governmental action of other departments, examples of which are rather rare in our constitutional law. However, in extraordinary circumstances this proper authority of the executive department is particularly plain; and such political action should receive implicit obedience. Thus military necessity might justify the declaration of an embargo, in which case a steamship line would be obliged to tie up its vessels and refuse further freight. To take one



other prominent example, the military authorities would usually be justified in assuming control of the railroad systems extending into the theatre of war. In such a case it was held that the railroad would have an excuse for refusing to accept food-stuffs tendered it without the transit permit which the military authorities had required should be obtained from them by the shipper.<sup>1</sup> What is true of martial authority within the belligerent's own territory is of course still more clear of military government over conquered territory. Those engaged in any service in that territory are subservient to the orders of the military arm in accepting business. In addition to withholding permission to do business by reason of possible danger to its own interests in either case, the military authorities may order the discontinuance of public service because they need the facilities in their own operations. And even a carrier from a neutral may refuse to accept contraband goods for transportation to one of the belligerent countries or to a blockaded port, if it is unwilling to run the risk of capture by the belligerent.<sup>2</sup> And it may refuse to engage itself in a service which will bring it into collision with the authorities of another nation or any violation of its laws.

It must be obvious that when the refusal to serve is made necessary by such exercise of governmental authority there is an excuse. An interesting case in point is *Decker v. Atchison, Topeka and Santa Fé Railroad Company*.<sup>3</sup> The plaintiff was not given the transportation he demanded upon the morning in question because on the 16th day of September, 1893, the defendant railroad company had prescribed a certain rule for the government of its trains entering the Cherokee Outlet on the day of its opening for settlement, providing that no train should enter said outlet within six hours of 12 o'clock noon of said day. Mr. Justice Scott held this refusal under all these circumstances to be entirely justifiable; he said:

"The opening of the Cherokee Outlet to settlement has gone down into history as a scene and an occasion unequaled by any similar event of modern times. A vast domain was opened to homestead settlement in a day, and more than 100,000 people waited upon the borders for the hour of noon, when they could break forth on a wild rush for either town lots or homestead

<sup>1</sup> *Illinois Central R. R. Co. v. Phelps*, 4 Ill. App. 238 (1879); *Illinois Central R. R. Co. v. Hornberger*, 77 Ill. 457 (1875); *Phelps v. Illinois Central R. R. Co.*, 94 Ill. 548, (1880).

<sup>2</sup> See *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 112 Fed. 829 (1902).

<sup>3</sup> 3 Okla. 553 (1895).

lands. At the particular point where the trains of the defendant in error were located, thousands thronged to board the first train to enter, and, if possible, gain some advantage and get to the promised land before the awful rush. Had trains gone into the country prior to 12 o'clock, hundreds would have become violators of the law no doubt, and, had the defendant in error permitted those already aboard when the trains arrived at the line to remain in the coaches, those waiting on the line to enter trains according to the order of the Secretary of the Interior and the rules prescribed by the company would have been placed at a disadvantage, and their rights under the law would have been unequal and prejudiced thereby. Yes, this rule was a reasonable one, and, in addition to this, was adopted by defendant in error by order of the Secretary of the Interior; and for this court to hold, or the court below to have held, as a matter of law, that it was an unreasonable rule, would, we think, have been error."<sup>1</sup>

### III.

A public service company cannot be required to furnish a service which it is not authorized to perform.<sup>2</sup> Thus it cannot be called upon to render any sort of service which it is not empowered to perform. In a recent case a petitioner sought to have illuminating gas from a company which it had been shown in other litigation had only authority to supply heating gas.<sup>3</sup> Said the Court:

"Obviously, unless the defendant be shown to be exercising a public franchise in the vending of gas for lighting purposes, there is no more ground for injunction shown here than if he had sought one to restrain Peaslee, Gaulbert & Co. from refusing to vend oil to him. But the petition on its face shows that, as to the sale of gas for lighting purposes, the defendant was not only not exercising a public franchise, but was, by the ordinance which permitted it to do business in Louisville at all, expressly forbidden to sell gas for any other than heating purposes. The plaintiff is therefore in the position of asking an injunction requiring the defendant to violate an ordinance of the city."

And in a late case<sup>4</sup> a water company was held justified in preparing to discontinue service, its franchise having expired. The doctrine of the court is thus summarized in the headnote:

<sup>1</sup> The same would be true of transportation asked which would involve disobedience of customs regulations, as landing goods at a port not a port of entry.

<sup>2</sup> *People v. St. Louis & B. Electric Ry. Co.*, 122 Ill. App. 422 (1905).

<sup>3</sup> *Nairn v. Kentucky Heating Co.*, 27 Ky. Law Rep. 551 (1900).

<sup>4</sup> *Wade v. Lutchter & M. Lumber Co.*, 74 Fed. 517 (1896).



"On the expiration of a water company's franchise by limitation, the company's right to operate its plant and use the streets of the city therefor ceased, and with it the right of the city to demand service. But where, after the expiration of a water company's franchise, it continued to operate its plant and render service to the public, it was bound during such period to perform the obligations growing out of such assumed quasi-public service, to the extent that it was required to supply water adequate to its reasonable capacity and at reasonable rates, and to that extent it was subject to the jurisdiction of the courts to enforce its implied undertaking. Where a water company, after the termination of its franchise, continued to furnish water, it did so according to a quasi-contractual relation, which was a mere license from which either it or the city could withdraw at will. But a water company continuing to furnish water after the termination of its franchise is subject to regulation by the state or the municipality."

#### IV.

There is much force in this reiterated distinction. A logging corporation operating a private railway cannot be called upon to take passengers,<sup>1</sup> although if it does so generally, it might be held liable as a common carrier to particular passengers actually accepted, notwithstanding the *ultra vires*.<sup>2</sup> Perhaps the plainest case of this general justification is that one where an irrigation company<sup>3</sup> of which the service was asked, was under an injunction ordering it not to render such service. Plainly in such case it is a good defense that compliance with the request will involve it in contempt of court. But it is almost equally plain that common-law process should be respected.<sup>4</sup>

Wherever there is a statute directly applying to the service in question and expressly stating the conditions under which alone service can be given, there is of course a resulting excuse whenever a

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<sup>1</sup> *Laighton v. Carthage*, 175 Fed. 147 (1910).

<sup>2</sup> *Albion Lumber Co. v. De Norbra*, 72 Fed. 739 (1896).

<sup>3</sup> *Sample v. Fresno F. & Irrigation Co.*, 129 Cal. 222 (1900). See *accord*, *Nairn v. Kentucky Heating Co.*, 27 Ky. Law Rep. 551 (1900).

<sup>4</sup> *Brunswick & W. R. Co. v. Ponder*, 117 Ga. 63 (1903); *Indiana, I. & I. Ry. Co. v. Doremeyer*, 20 Ind. App. 605 (1898); *Landa, Holck & Co., et al., v. Missouri, K. & T. Ry. Co.*, 129 Mo. 663 (1895); *Bliven v. Hudson R. R. Co.*, 35 Barb. (N. Y.) 188 (1861). See also *Mitchell v. Kansas City C. & S. Ry. Co.*, 116 Mo. App. 116 (1906).

service is asked which comes within its prohibitions. Several examples may be drawn from federal statutes where the number of passengers which a vessel may carry is regulated under the provisions of a statute; the carrier would of course have an excuse for not accepting additional passengers who offer themselves after the vessel has its complement.<sup>1</sup> So if it is illegal for a railroad to let its cars stand in the street it can refuse to permit goods to be loaded upon that part of a spur which is laid through a street without liability for discrimination in so refusing.<sup>2</sup> Where an explicit ordinance of the Board of Health forbids the transportation of corpses except when accompanied by a person in charge having a transit permit containing specified information, a railroad may refuse transportation when all of this information is not filled in.<sup>3</sup> But where a local ordinance forbade an express company to bring liquors and the carrier accordingly refused to act, the ordinance being held invalid, the carrier was held liable, as he must make out his defense at his peril.<sup>4</sup>

## V.

Where the service in question is forbidden on Sunday either by a general statute applying to all business, or by a specific statute dealing with the particular business, there is of course an excuse as a consequence. Thus a carrier may refuse to carry on Sunday<sup>5</sup> and need not be prepared to carry even when necessity or charity is involved, so long as any statutory prohibition which applies to him remains.<sup>6</sup> If there is no statutory prohibition, the cases hold that it does not follow that the carrier is bound to transact business on that day unless he chooses to do so.<sup>7</sup> The situation is the same as to holidays other than Sunday.<sup>8</sup>

But if he holds himself out to the public as so doing, and actually

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<sup>1</sup> See *Schwerin v. North Pac. C. R. Co.*, 36 Fed. 710 (1888).

<sup>2</sup> *Louisville & N. R. R. Co. v. Pittsburg & K. Coal Co.*, 111 Ky. 960 (1901).

<sup>3</sup> *Lake Erie & W. R. R. Co. v. James*, 10 Ind. App. 550 (1894).

<sup>4</sup> *Southern Express Co. v. Rose Co.*, 124 Ga. 581 (1905).

<sup>5</sup> *Walsh v. Chicago, M. & St. P. Ry. Co.*, 42 Wis. 23 (1877). As to the constitutionality of forbidding service on Sunday, see *Hennington v. Georgia*, 163 U. S. 299 (1896).

<sup>6</sup> *Horton v. Norwalk Tramway Co.*, 66 Conn. 272 (1895).

<sup>7</sup> *Merchants' Wharfboat Assoc. v. Wood*, 64 Miss. 661 (1887).

<sup>8</sup> *Pennsylvania R. R. Co. v. Naive*, 112 Tenn. 239 (1903).



enters upon business transacted on that day, he cannot shield himself for either misfeasance or non-feasance because it was done or omitted to be done on the Sabbath.<sup>1</sup> Thus it is generally agreed that if a carrier actually accepts general goods on Sunday, he is liable for not forwarding them immediately. A carrier must continue transportation already begun on Sunday. And by a similar principle he must accept goods from a connecting carrier on Sunday.<sup>2</sup>

The law on this point has been elaborately worked out in relation to telegraphing. A telegraph company, if its office be open, must receive on Sunday all messages the handling of which may fairly be said to be a work of necessity or charity.<sup>3</sup> Unless the circumstances have been explained to the operator or the message bears on its face evidence of its special character, it may be refused as may be all commercial or social messages.<sup>4</sup> However, all messages which are actually accepted must be handled with due diligence throughout their course.<sup>5</sup>

As to the other services, there is as yet little authority. Some services, it is generally agreed, should be open to the public on all days: inns<sup>6</sup> and canals<sup>7</sup> are examples to which a citation may be given. And it is most obvious that in certain other callings service should be given regardless of days: gas and electric supply, water and sewerage service, are plain examples of instances where modern necessity overbears the Sunday policy.

<sup>1</sup> *Merchants' Wharfboat Assoc. v. Wood*, 64 Miss. 661 (1887).

<sup>2</sup> *Philadelphia W. & B. R. R. Co. v. Lehman*, 56 Md. 209 (1881).

<sup>3</sup> *Western Union Telegraph Co. v. Wilson*, 93 Ala. 32 (1890); *Rogers v. Western Union Telegraph Co.*, 78 Ind. 169 (1881); *Western Union Telegraph Co. v. Yopst*, 118 Ind. 248 (1888); *Western Union Telegraph Co. v. Griffin*, 1 Ind. App. 46 (1890); *Western Union Telegraph Co. v. Eskridge*, 7 Ind. App. 208 (1893); *Western Union Telegraph Co. v. McLaurin*, 70 Miss. 26 (1892); *Burnett v. Western Union Telegraph Co.*, 39 Mo. App. 599 (1890); *Gulf, C. & S. F. Ry. v. Levy*, 59 Tex. 542 (1883).

<sup>4</sup> *Western Union Telegraph Co. v. Hutcheson*, 91 Ga. 252 (1892); *Willingham v. Western Union Telegraph Co.*, 91 Ga. 449 (1893); *Western Union Telegraph Co. v. Henley*, 23 Ind. 14 (1899); *Thompson v. Western Union Telegraph Co.*, 32 Mo. App. 191 (1888); *Burnett v. Western Union Telegraph Co.*, 39 Mo. App. 599 (1890).

<sup>5</sup> *Western Union Telegraph Co. v. McLaurin*, 70 Miss. 26 (1892).

<sup>6</sup> *Rex v. Ivens*, 7 C. & P. 213 (1835).

<sup>7</sup> *McArthur v. Green Bay & Miss. Canal Co.*, 34 Wis. 139 (1874).

## VI.

Some difficult problems arise as to the duty of common carriers to transport liquors into prohibition territory. It is certain that if the delivery would involve the carrier in an illegal transaction he may refuse to undertake it. In the leading case on this point, *State v. Goss*,<sup>1</sup> Mr. Justice Rowell said:

"Although express companies are common carriers, and liable as such, yet the law neither requires nor permits them to do illegal acts; and they are not bound to transport and deliver intoxicating liquor or other commodities, if thereby they would commit an offence or incur a penalty. They cannot be allowed, any more than other people, knowingly and with impunity, to make themselves agents for others to break the laws of the State."

Where the local legislation specifically forbids the transportation of intoxicating liquor, the carrier can, of course, refuse to accept. Moreover, as one case<sup>2</sup> holds, the carrier has discretionary power to determine whether the liquors offered are intoxicating in the sense of the law. But if the sale only is illegal the carrier cannot refuse to bring the liquors which may be resold illegally.<sup>3</sup> Thus, where the sale of liquor in original packages was lawful in South Carolina, though it was forbidden in any other form, the carrier could not refuse to receive liquor in the original packages for delivery in South Carolina.<sup>4</sup>

Where it is made illegal by statute to transport fish or game, a carrier may refuse to accept such fish or game if acceptance would promote the violation of the statute or impede its administration. But it will not itself be guilty of violating the act if it has in its possession such fish or game which it has received in packages in regular course without reasonable grounds of suspicion.<sup>5</sup> If in obedience to orders of game inspectors or fish wardens, it delivers up such game or fish for seizure, it will have a sufficient excuse; but apparently there is no protection if these officers acted without authority of law.<sup>6</sup>

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<sup>1</sup> 59 Vt. 266 (1886).

<sup>2</sup> *Milwaukee M. E. Co. v. Chicago, R. I. & P. Ry.*, 73 Iowa 98 (1887).

<sup>3</sup> *Crescent Liquor Co. v. Platt*, 148 Fed. 894 (1906); *Southern Express Co. v. State*, 107 Ga. 670 (1899); *Southern Express Co. v. Rose Co.*, 124 Ga. 581 (1905).

<sup>4</sup> *Blumenthal v. Southern Ry.*, 84 Fed. 920 (1898).

<sup>5</sup> *State v. Swett*, 87 Me. 99 (1895).

<sup>6</sup> *Merriman v. Great Northern Exp. Co.*, 63 Minn. 543 (1896).



Quarantine regulations duly established by law will excuse a carrier from accepting passengers destined beyond the quarantine barriers, when it is set up against all passengers coming from a certain district to a certain district; or any passengers, association with whom would detain other passengers.<sup>1</sup> And the same is true of live freight or dead freight against which quarantine is legally declared.<sup>2</sup> However, a carrier who knows of the quarantine, and does not disclose it at the time of acceptance, will be liable, unless the quarantine is so notorious that he may assume that it is known.<sup>3</sup> But it is usually provided that under certain conditions certificates may be obtained, in which case the owners should be duly notified.<sup>4</sup> Regulations providing that water shall not be turned on until an officer of the Board of Health is satisfied as to the plumbing arrangements<sup>5</sup> ought to be respected. And so must laws regulating the transportation of corpses.<sup>6</sup>

## VII.

Of course one engaged in public employment should refuse to take any action which would make him liable for abetting illegality. Thus, a carrier of passengers could refuse to take upon the train one fleeing from justice, one going upon the train to assault a passenger, or to commit larceny.<sup>7</sup> In an analogous case it was assumed that the carrier might refuse to take a rebel officer going to the front to join his command.<sup>8</sup> But if the carrier does not know of the illegal nature of the request, he is not legally liable to the owner for taking goods according to his *prima facie* duty.<sup>9</sup> However, a railroad company which negligently permitted slaves to be transported without the authority of their owner, was held liable for their value by reason of being concerned in their escape.<sup>10</sup>

Upon similar principles a telegraph company should refuse to

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<sup>1</sup> *St. Clair v. Kansas City M. & B. R. R. Co.*, 77 Miss. 789 (1900).

<sup>2</sup> *Fort Worth & D. C. Ry. Co. v. Masterson*, 95 Tex. 262 (1902).

<sup>3</sup> *St. Clair v. Kansas City M. & B. R. R. Co.*, 76 Miss. 473 (1899).

<sup>4</sup> *St. Louis & S. F. R. Co. v. Roane*, 93 Miss. 7 (1908).

<sup>5</sup> But see *Johnson v. Belmar*, 58 N. J. Eq. 354 (1899).

<sup>6</sup> *Lake Erie & W. R. R. Co. v. James*, 10 Ind. App. 550.

<sup>7</sup> See the *dicta* in *Thurston v. Union Pac. R. Co.* 4 Dill. (U. S.) 321 (1877).

<sup>8</sup> *Turner v. North Carolina R. R.*, 63 N. C. 522 (1869).

<sup>9</sup> *Jackson v. Railway Co.*, 87 Mo. 422 (1885).

<sup>10</sup> *Louisville & N. R. R. Co. v. Young*, 1 Bush (Ky.) 401 (1866).

transmit messages which would implicate it in illegality.<sup>1</sup> While it is true there can be no discrimination where the business is lawful, no one can be compelled to aid in unlawful undertakings, or is justified in so doing. A telegraph company should refuse to send libelous<sup>2</sup> or obscene<sup>3</sup> messages, or those which clearly indicate the furtherance of an illegal act or the perpetration of some crime. Recently in New York the telephone and telegraph instruments were taken out of "pool rooms" which were used for the purpose of selling bets on horse races.<sup>4</sup> A telegraph company will be liable for transmitting a forged message, knowing it to be such. It is, therefore, its undoubted right to refuse unauthorized messages,<sup>5</sup> since it might thereby become involved in the perpetration of frauds.

### VIII.

There are several cases involving prostitution which test these principles. A carrier of passengers cannot refuse to let a prostitute travel on its trains. As the Court sagely said in the leading case:<sup>6</sup>

"The carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while traveling. Neither can the carrier use the character for chastity of his female passengers as a basis of classification, so that he may put all chaste women, or women who have the reputation of being chaste, into one car, and those known or reputed to be unchaste in another car. Such a regulation would be contrary to public policy, and unreasonable. It would put every woman purchasing a railroad ticket on trial for her virtue before the conductor as her judge, and, in case of mistake, would lead to breaches of the peace. It would practically exclude all sensible and sensitive women from traveling at all, no matter how virtuous, for fear they might be put into or unconsciously occupy the wrong

<sup>1</sup> See *Gray v. Western Union Telegraph Co.*, 87 Ga. 350 (1891).

<sup>2</sup> See *Dominion Telegraph Co. v. Silver*, 10 Can. Sup. Ct. 238 (1881).

<sup>3</sup> See *Archambault v. Great North Western Telegraph Co.*, 14 Quebec 8 (1886).

<sup>4</sup> See *Matter of Cullen v. New York Telephone Co.*, 106 N. Y. App. Div. 250 (1905).

<sup>5</sup> *Western Union Telegraph Co. v. Totten*, 141 Fed. 533 (1905); *Bank of Havlock v. Western Union Telegraph Co.*, 141 Fed. 522 (1905).

<sup>6</sup> *Brown v. Memphis & C. R. Co.* 5 Fed. 499 (1880); *Pullman Palace Car Co. v. Bales*, 80 Tex. 211 (1891), unless these women notoriously habitually misconduct themselves *en route*. *Beeson v. Chicago R. I. & Pac. Ry. Co.*, 62 Iowa 173 (1883); *Stevenson v. West Seattle Land Co.*, 22 Wash. 84 (1900).



car. The police power of the carrier is sufficient protection to other passengers, and he can remove all persons, men or women, whose conduct at the time is annoying, or whose reputation for misbehavior and indecent demeanor in public is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive or annoying to others traveling in the same car; and this is as far as the carrier has any right to go. He can no more classify women according to their reputation for chastity, or want of it, than he can so grade the men."

In none of the carriers cases is the problem so well worked out as in a recent case,<sup>1</sup> where a telephone company refused to give service to a bawdy house upon general principles thus discussed:

"It is argued that a common carrier would not be authorized to refuse to convey the plaintiff because she keeps a bawdy house. Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdy house. A common carrier could not be compelled to haul a car used for such purpose. If the plaintiff wished to have the phone placed in some other house used by her, or even in a house where she resided, but not kept as a bawdy house, she would not be debarred because she kept another house for such unlawful and disreputable purpose. It is not her character, but the character of the business at the house where it is sought to have the telephone placed, which required the court to refuse the mandamus. In like manner, if a common carrier knew that passage was sought by persons who are traveling for the execution of an indictable offense, or a telegraph company that a message was tendered for a like purpose, both would be justified in refusing; and certainly when the plaintiff admits that she is carrying on a criminal business in the house where she seeks to have the telephone placed the court will not, by its mandamus, require that facilities of a public nature be furnished to a house used for that business. For like reason a mandamus will not lie to compel a water company to furnish water, or a light company to supply light, to a house used for carrying on an illegal business. The courts will enjoin or abate, not aid, a public nuisance."

## IX.

What surely may be refused upon general principles is a service which is necessary to the conduct of an illegal business. To confine the discussion to one problem upon which there is much

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<sup>1</sup> *Godwin v. Carolina Tel. & Tel. Co.*, 136 N. C. 258 (1904). See however *Western Union Telegraph Co. v. Ferguson*, 57 Ind. 495.

authority, it would seem plain that a telegraph company is not obliged to furnish a service necessarily connected with illegal operations. Where the running of a bucket shop is held an illegal business, it is therefore held in most cases that the telegraph company is not bound to furnish it with market reports, either by virtue of its duties as a public servant to serve all customers without discrimination, or even by virtue of any contract which it may have entered into with such a subscriber as this.<sup>1</sup> Thus the regulation of an exchange to prevent such distribution of its quotations has universally been held reasonable. "It is simply a restraint on the acquisition for illegal purposes of the fruits of the plaintiff's work," as the United States Supreme Court recently said.<sup>2</sup> Where the business is simply against public policy, the question is more difficult. The cases are somewhat divided as to whether a telegraph company can refuse to handle messages in relation to the sale of options or futures in jurisdictions where the law simply refuses to enforce such contracts as *contra bonos mores*. There are cases<sup>3</sup> which hold that the company is assuming too much in refusing to transmit such message, but by the weight of authority it is justified.<sup>4</sup> These last cases seem to the writer fundamentally right.

In the cases which have just been discussed the service asked might fairly be said directly to promote the illegality. In such cases the policy justifying refusal is sufficiently plain. But when the illegality is remote from the service asked, it has been assumed that the request cannot be refused. Thus, to illustrate this distinction, innkeepers can refuse to harbor an immoral woman who is entertaining her companions in her rooms,<sup>5</sup> but a railroad cannot refuse to transport a prostitute to a new field.<sup>6</sup> To make another dis-

<sup>1</sup> *Bryant v. Western Union Telegraph Co.*, 17 Fed. 825 (1883); *Sullivan v. Postal Tel. Cable Co.*, 123 Fed. 411 (1903); *Western Union Telegraph Co. v. State*, 165 Ind. 492 (1905); *Smith v. Western Union Telegraph Co.*, 84 Ky. 664 (1887); *Central S. & G. Exch. v. Board of Trade*, 196 Ill. 396 (1902); *Cain v. Western Union Telegraph Co.*, 18 Cinn. Wk. Bul. 267 (1887); *Sterett v. Philadelphia Telegraph Co.*, 18 Wk. St. Cas. (Pa.) 77 (1887).

<sup>2</sup> *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236 (1905); citing with full approval *Central Stock & Grain Exchange v. Board of Trade*, 196 Ill. 396 (1902).

<sup>3</sup> *Western Union Telegraph Co. v. State*, 165 Ind. 492 (1905). And see *Western Union Telegraph Co. v. Hill*, 65 S. W. 1123 (Tex. Civ. App., 1902).

<sup>4</sup> *Gist v. Telegraph Co.*, 45 S. C. 344 (1895); *Western Union Telegraph Co. v. Harper*, 15 Tex. Civ. App. 37 (1896).

<sup>5</sup> See *Curtis v. Murphy*, 63 Wis. 4 (1885).

<sup>6</sup> *Brown v. Memphis & C. R. Co.* 4 Fed. 37 (1880).



tion, it has been held that a carrier could refuse to take money intended for use in the contraband trade,<sup>1</sup> while it might be obliged to transport a bundle of stationery intended by the consignee for use in his business of dealing in futures.<sup>2</sup> This last point is interesting as it shows another aspect of this principle. When the business which will be aided is illegal in a high degree it taints transactions far removed from it, but where the business is simply against public policy, the taint does not even touch collateral transactions. For example, a carrier cannot refuse to accept goods for transportation when it is known that the owner intends to dispose of them on Sunday;<sup>3</sup> but it would seem that a carrier might refuse to bring firearms into a district where mob violence prevailed, although not consigned to known participants.<sup>4</sup>

## X.

Again, whatever illegality there may have been previous to the time when the service is requested, should not affect the right to have present service if the illegal conduct has ceased to operate. Thus where a man who had brought a prostitute to an inn remained after the woman had left the inn, and lost his goods, it was held that he might recover from the innkeeper. Even assuming that such misconduct would have barred him while the misconduct continued, the loss here happened after his misconduct ceased, and his previous immorality could not affect his subsequent status as a guest.<sup>5</sup> On the same principle, in a case where it appeared that the defendant was received at the inn on Sunday, and that to reach the inn on that day he had broken the statute which forbade traveling on Sunday, he was held to be a guest nevertheless, since the relationship was established by acts not necessarily connected with traveling on Sunday.<sup>6</sup>

To go to the other extreme, it makes no difference to the right to service that illegal conduct may happen after the service is complete, provided that such conduct will be really independent of the service

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<sup>1</sup> *Canter v. Bennett*, 39 Tex. 303 (1873).

<sup>2</sup> See *Gray v. Western Union Telegraph Co.*, 87 Ga. 350 (1891).

<sup>3</sup> *Waters v. Railroad*, 110 N. C. 338 (1892).

<sup>4</sup> See *Railroad Co. v. O'Donnell*, 49 Oh. St. 489 (1892).

<sup>5</sup> *Lucia v. Omel*, 46 N. Y. App. Div. 200 (1899), affirmed in 53 N. Y. App. Div. 641 (1900).

<sup>6</sup> *Cox v. Cook*, 14 Allen (Mass.) 165 (1867).

asked. Thus a railroad cannot excuse itself for failure to transport liquor by showing that the consignee may probably resell it in violation of the prohibition law;<sup>1</sup> or that a passenger is likely to get herself into trouble upon her arrival at her destination, it being usual for her to become intoxicated there.<sup>2</sup> This is not so plain upon the authorities as it ought to be. In one early leading case it seems to have been held that a competitor might be refused transportation to a point where he intended to take return passage and then solicit business on board in violation of proper regulations.<sup>3</sup> In a later case<sup>4</sup> much cited, it was said that a passenger who had been banished by the vigilance committee might be refused transportation back to San Francisco, where a violent fate probably awaited him. But there are various factors in each of these cases which may help to explain them away.

## XI.

Upon the whole it would seem to be clear that this new law relating to the various matters discussed in this article is being worked out very well, if one may judge it by the closest analogy in established law. The true extent of public duty depends in last analysis upon public policy just as does the real extent of contractual obligations. Whatever policy is strong enough to excuse one from the performance of a contract obligation ought surely to justify one in refusing to perform this common-law obligation.

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<sup>1</sup> *Southern Express Co. v. State*, 107 Ga. 670 (1899).

<sup>2</sup> *Stevenson v. West Seattle Land & Imp. Co.*, 22 Wash. 84 (1900).

<sup>3</sup> *Jencks v. Coleman*, 2 Sumn. (U. S.) 221.

<sup>4</sup> *Pearson v. Duane*, 4 Wall. (U. S.) 605 (1866), discussed, 18 L. Ed. 447.



THE LIABILITY OF AN UNDISCLOSED  
PRINCIPAL.

## II.

§ 19. *Of the Second Exception — "Election."* — The second exception to the general rule is commonly said to rest upon the theory of "election." A wholly anomalous situation is presented. A contract has been made which in terms binds the agent only. Nevertheless the principal may be made liable upon it. How is he liable? Although the other party may perhaps sue both of them severally but simultaneously, or possibly sue both jointly,<sup>1</sup> the obligation can hardly be deemed a joint one in the sense that it can ultimately be enforced against both.<sup>2</sup> Neither can it be said that both are liable severally in the sense that recovery can be had partly from each. The liability is commonly said to be an alternative one. The agent can be held because he made the contract in his own name, *or* the principal can be held because it is in law deemed his contract. Which one shall be held? The answer ordinarily given is that the other party may "elect" between them. As a corollary to this, it is said that the other party has but one choice; that when he has made his election his determination is final; and he cannot afterwards make a new choice even though his first efforts did not result in a satisfaction of his claim. How far this is true it is now necessary to inquire. Before doing so, it may be well to notice one preliminary matter.

Election properly is a matter of choice. It does not rest upon estoppel. It is not therefore essential in order to make it conclusive that it shall appear to have misled the principal to his prejudice. If, however, it has misled him, — if the principal, being apprised of the fact that the other party has elected to look to the agent, settles with the agent upon that basis and either pays him or allows him a corresponding credit, — nothing could be more unjust than to permit

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<sup>1</sup> See cases *post*, § 24.

<sup>2</sup> See *Tew v. Wolfsohn*, *supra*; *McLean v. Sexton*, *supra*; *Gay v. Kelley*, *supra*; *Belt v. Washington Power Co.*, 24 Wash. 387; *Steele Smith Grocery Co. v. Potthast*, 109 Iowa 413.

the other party afterwards to repudiate his action with the agent and resort to the principal.<sup>1</sup>

§ 20. *Theories of Election.* — With reference to this matter of election four views are possible: 1. That the other party unexpectedly finds himself in a situation where he can hold one of two parties liable and he must simply choose between them. 2. That the other party, inasmuch as he has a contract in terms with the agent, will presumptively pursue this obligation, and that therefore some affirmative action is necessary to show that he intends to abandon this for his remedy against the principal. 3. That the other party, as soon as he discovers the existence of the principal, will presumptively look to him rather than to the agent, and that some affirmative act is therefore necessary to show that he prefers to hold the agent. 4. That the other party, having actually dealt with the agent as principal and obtained an obligation against him, but finding unexpectedly that he also has a claim against the principal, intends to make the most of the situation, — to keep and enforce his claims against both until he has obtained satisfaction from one of them or has done something which in fact or in law shows that he has abandoned his claim against one or the other of them.

Any one of these views might undoubtedly be taken, but no one of them, in fact, has been consistently held. The field is therefore open for the adoption of the one which seems most consistent with principle and the peculiarities of the situation. That the last is the sound and natural view would seem to require no argument to establish, although it undoubtedly is not election in the ordinary sense. From the standpoint of the liability of the principal it would lead to this conclusion: that no act with reference to keeping alive or enforcing the liability of the agent would discharge the principal unless

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<sup>1</sup> *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574; *Thomson v. Davenport*, 9 Barn. & Cress. 78; *Horsfall v. Fauntleroy*, 10 Barn. & Cress. 755; *Smyth v. Anderson*, 7 Com. Bench 21; *Irvine v. Watson*, 5 Q. B. Div. 102; *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Heald v. Kenworthy*, 10 Exch. 739; *Kymer v. Suwercropp*, 1 Camp. 109; *Macfarlane v. Giannacopulo*, 3 Hurl. & Nor. 860; *Clealand v. Walker*, 11 Ala. 1058; *Cheever v. Smith*, 15 Johns. (N. Y.) 276; *Bush v. Devine*, 5 Har. (Del.) 375; *Brown v. Bankers, etc. Tel. Co.*, 30 Md. 39; *Schepflin v. Dessar*, 20 Mo. App. 569; *Hyde v. Wolfe*, 4 La. 234; *Homans v. Lambard*, 21 Me. 308.

One who gives a receipt to a State agent without actual payment cannot afterwards hold the State, although he has given notice to the accounting officers not to allow such receipt as a credit to the agent. *Fitler v. Commonwealth*, 31 Pa. 406.



it also showed that the other party did not intend to charge the principal.

§ 21. *Knowledge necessary.* — Election, as has been pointed out, involves choice, and choice presupposes knowledge of the alternatives and freedom to choose between them. The other party cannot elect between the principal and the agent so long as he does not know that there was a principal in the transaction; and this knowledge must include not only the fact of the agency but the name and identity of the principal.<sup>1</sup> What he may do before that cannot be charged to him as an election.

§ 22. *What constitutes an Election.* — It is impossible to lay down any hard and fast rule by which it can, in all cases, be determined what constitutes an election until there is agreement as to what is meant by election. The other party may, of course, by some express and unequivocal act, done with that direct intent, declare his purpose to treat the agent only as his debtor in such a manner as to leave no room for doubt; but in the majority of the cases the intention of the other party is to be gathered from his words and conduct, and the various circumstances which surround the case. If the case were one of ordinary election, any act which unequivocally indicated a purpose to pursue either the principal or the agent would suffice; but it is quite clear that we are not dealing with an ordinary case at all. This will be evident from a consideration of the cases which have actually been decided, distinguishing between what is done before and what is done after the discovery of the principal.

§ 23. I. *Before Discovery.* — As has already been pointed out, any act done before knowledge of the principal, unless it amounts to an absolute discharge, extinction, or merger of the debt, cannot amount to such an election to charge the agent as will release the principal when discovered.

Thus it has been held the taking of an agent's promissory note or acceptance for the price of goods sold to him by one who knew he was acting as agent, but who did not know for whom, will not conclude the seller from holding the principal also when subsequently discovered;<sup>2</sup> nor will the fact that the vendor charged the goods to

<sup>1</sup> *Greenburg v. Palmieri*, 71 N. J. L. 83; *Steele Smith Grocery Co. v. Potthast*, 109 Iowa 413; *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Merrill v. Kenyon*, 48 Conn. 314.

<sup>2</sup> *Merrill v. Kenyon*, 48 Conn. 314; *Harper v. Bank*, 54 Ohio St. 425; *Pope v. Meadow, etc. Co.*, 20 Fed. 35. "If the vendor on a sale made to an agent take

the agent,<sup>1</sup> or sent him a statement of the account made out in his name,<sup>2</sup> supposing him to be the principal, prevent the vendor from subsequently charging the real principal when ascertained to be such.

The commencement of an action against the agent, before knowledge, cannot be deemed an election;<sup>3</sup> and even the recovery of a judgment against the agent, before discovery of the principal, has been held not to be a bar to an action against the principal when discovered unless he discharges the judgment against the agent.<sup>4</sup> This latter holding may, perhaps, be open to question, not because the recovery of judgment constitutes an election, but upon the ground of merger.<sup>5</sup>

§ 24. II. *After Discovery.* — After knowledge of the existence and identity of the principal comes to the other party, he is in a position to choose between the principal and the agent. All of the aspects of election are at once presented. If it be treated merely as a matter of choice, the question is, When has a choice been indicated? Treating the election in the manner suggested, however, the question becomes: What acts of the other party, in view of the liability of both principal and agent, manifest an intention not to hold the principal? A number of situations have been considered in this connection.

*Presenting Claim.* — In one case,<sup>6</sup> after the discovery of the prin-

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the promissory note of the agent for the amount of the purchase, on failure of payment by the agent the principal would be equally liable to an action by the vendor, founded upon the original consideration, as if the note had been given by the principal himself." *Keller v. Singleton*, 69 Ga. 703.

<sup>1</sup> *Yates v. Repetto*, 65 N. J. L. 294. See also *Raymond v. Crown*, etc. *Mills*, 2 Metc. (Mass.) 319; *French v. Price*, 24 Pick. (Mass.) 13; *Guest v. Burlington Opera House Co.*, 74 Iowa 457.

<sup>2</sup> *Henderson v. Mayhew*, 2 Gill (Md.) 393.

<sup>3</sup> *Brown v. Reiman*, 48 N. Y. App. Div. 295; *Ranger v. Thalmann*, 39 N. Y. Misc. 420; *Rommel v. Townsend*, 83 Hun (N. Y.) 353; *Steele Smith Grocery Co. v. Potthast*, 109 Iowa 413.

<sup>4</sup> *Greenburg v. Palmieri*, 71 N. J. L. 83; *Lindquist v. Dickson*, 98 Minn. 369; *Brown v. Reiman*, *supra*.

<sup>5</sup> This question of merger is not easy to dispose of. How many contracts are there? Is there the visible contract of the agent and another, invisible, contract of the principal? Is there but one contract either of the principal or of the agent at the election of the other party? Is there but one contract upon which principal and agent may be held jointly, as is said in several of the cases cited in a following note? Here are obviously, but in a different form, the same questions arising under the doctrine of election. See the (dissenting) opinion of Lord Penzance in *Kendall v. Hamilton*, 4 App. Cas. 504.

<sup>6</sup> *Curtis v. Williamson*, L. R. 10 Q. B. 57 (1874).

In *Jones v. Johnson*, 86 Ky. 530 (1888), while the creditor had an action pending



cipal, the creditor filed a claim against the estate of the agent who had become insolvent. The proof was sent by mail. "Almost immediately" after this had been posted the creditor's attorneys, fearing that the presentation of this claim might prejudice the demand against the principal, sent a telegram to stop its presentation; but the telegram arrived too late, as the proof had already been filed. Nothing further, however, was done under it and no dividend was ever received. As a mere matter of election, many cases could be imagined wherein the filing of such a claim would be enough. Considered as evidence of an intention not to hold the principal, it could be strongly urged that merely keeping the claim alive against the agent was slight, if any, evidence that the creditor did not intend to follow the principal also. It was held not to be conclusive evidence, as a matter of law, of an intention to treat the agent as the only debtor. The argument was that, as the mere commencement of an action against the agent was not conclusive, the filing of the claim, which was less than the commencement of an action, ought not to be.

*Commencement of Action.*—As suggested in the preceding case, the mere commencement of an action against the agent, although this act is often regarded as an election in other fields, is not here deemed to constitute a conclusive election as a matter of law,<sup>1</sup> whatever may be its force as evidence of an election as a matter of fact. There is, moreover, as has been seen, authority for saying that principal and agent may be simultaneously sued severally, and possibly even jointly.<sup>2</sup>

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against the principal, he filed a claim against the estate of the insolvent agent and received a small dividend upon it. *Held*, that this did not defeat his action against the principal.

In *Hoffman v. Anderson*, 112 Ky. 893 (1902), the claim was presented first against the estate of the principal and a small dividend received. *Held*, that this did not prevent a subsequent proceeding against the agent.

<sup>1</sup> *Ferry v. Moore*, 18 Ill. App. 135; *Curtis v. Williamson*, *supra*; *Raymond v. Crown*, etc. Mills, 2 Metc. (Mass.) 319; *Cobb v. Knapp*, 71 N. Y. 348.

In *Raymond v. Crown*, etc. Mills, *supra*, the creditor took out a writ against the agent before discovering the principal; before the writ was served he discovered the principal and inserted his name also, and the writ was thus served; later the creditor discontinued as to the agent. *Held*, not as matter of law to defeat the action against the principal.

See also *McLean v. Sexton*, 44 N. Y. App. Div. 520; *Tew v. Wolfsohn*, 77 App. Div. 454; *Gay v. Kelley*, 123 N. W. 295 (Minn.).

<sup>2</sup> In *Pollock on Contracts* (7 ed., p. 105, Williston's *Wald's Pollock*, p. 116) it is said: "When it is said that he [the other party] has a right of election, this means that

*Prosecuting the action to judgment* against the agent, after discovery of the principal, has been held in several cases to constitute an election as a matter of law.<sup>1</sup> As a mere matter of ordinary election this is undoubtedly sound; as a matter of a possible merger it may also be sound; but if election be treated in the manner which has been suggested it cannot well be said that changing the form of the agent's obligation, or putting it into a condition in which it can be more readily enforced, is inconsistent with an intention to proceed against the principal also. Nothing short of satisfaction of the judgment against the agent would then release the principal as a matter of law, and some cases have so held.<sup>2</sup>

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he may sue either the principal or the agent, or may commence proceedings against both but may only sue one of them to judgment; and a judgment obtained against one, though unsatisfied, is a bar to an action against the other."

In *McLean v. Sexton*, 44 N. Y. App. Div. 520 [an action to foreclose a mechanic's lien], it is held that, under the New York code at least, both principal and agent may be sued in the same action. This, however, must be taken in connection with what is there said to be the rule in New York, — that prosecuting the action against either to judgment is not an election.

In *Tew v. Wolfsohn*, 77 N. Y. App. Div. 454, it is said: "Assuming that the plaintiff is only entitled to judgment against one of the defendants, and that he must elect which party he intends to hold, he cannot be required to make that election until the close of the case." This case was affirmed in the Court of Appeals, *Tew v. Wolfsohn*, 174 N. Y. 272, though that court declined to treat it as a case of undisclosed principal. The dissenting opinion of Cullen, J., discusses the general question quite fully.

In *Gay v. Kelley*, 123 N. W. 295 (Minn.), it is held that while prosecuting the action to judgment against one of the parties would be an election, where done with full knowledge, still where the alleged principal denies that he was such, the other party may join both in one action, and cannot be compelled to elect until the close of the testimony.

In *Coaling Co. v. Howard*, 130 Ga. 807, a joint action against several principals, only one of whom was disclosed at the time of contracting, was permitted. There was no discussion of the question.

<sup>1</sup> *Priestly v. Fernie*, 3 H. & C. 977 (1865); *Kingsley v. Davis*, 104 Mass. 178 (1870); *Tuthill v. Wilson*, 90 N. Y. 423; *per* Lord Ch. Cairns in *Kendall v. Hamilton*, L. R. 4 App. Cas. 504; *Sessions v. Block*, 40 Mo. App. 569; *Lindquist v. Dickson*, 98 Minn. 369; *Codd Co. v. Parker*, 97 Md. 319; *Ousterhout v. Day*, 9 Johns. (N.Y.) 114.

<sup>2</sup> *Beymer v. Bonsall*, 79 Pa. 298. This is said to be the rule in New York: *McLean v. Sexton*, 44 N. Y. App. Div. 520; *Tew v. Wolfsohn*, 77 N. Y. App. Div. 454; largely upon such approval of *Beymer v. Bonsall* as is to be found in *Cobb v. Knapp*, 71 N. Y. 348, and *First Nat. Bank v. Wallis*, 84 Hun (N. Y.) 376, neither one precisely in point. *Maple v. Railroad Co.*, 40 Ohio St. 313, so holds, but it was an action of tort.

As strong a statement, probably, as has been made against this view is that of Lord Chancellor Cairns in *Kendall v. Hamilton*, 4 App. Cas. 504 (a case of partnership). He said: "Now, I take it to be clear that, where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent,



*Taking Agent's Note.* — The effect of taking the agent's promissory note or bill of exchange, after the discovery of the principal, for a debt contracted before, is involved in some uncertainty. If the paper be expressly taken as payment, no question could ordinarily arise. In a few states the paper is presumptively taken as payment, and would ordinarily release the principal.<sup>1</sup> In the majority

or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of *Priestly v. Fernie*, 3 H. & C. 977, may be mentioned. But the reasons why this must be the case are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with and given credit to the agent, should be driven to sue the principal if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor on discovering the principal, who really has had the benefit of the loan, should be prevented suing him if he wishes to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he, the agent, would have a right of action for indemnity against his principal, while, if the principal were liable also to be sued, he would be vexed with a double action. Farther than this, if actions could be brought and judgments recovered, first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action; they might not necessarily be for the same amounts, and there might be recoveries had, or liens and charges created, by means of both, and there would be no mode, upon the face of the judgments, or by any means short of a fresh proceeding, of showing that the two judgments were really for the same debt or cause of action; and that satisfaction of one was, or would be, satisfaction of both."

The opinion in *Beymer v. Bonsall*, 79 Pa. 298, which is the leading case on the other side, is very brief and was *per curiam*. The court said: "Undoubtedly an agent who makes a contract in his own name without disclosing his agency is liable to the other party. The latter acts upon his credit and is not bound to yield up his right to hold the former personally, merely because he discloses a principal who is also liable. The principal is liable because the contract was for his benefit, and the agent is benefited by his being presumably the creditor, for there can be but one satisfaction. But it does not follow that the agent can afterwards discharge himself by putting the creditor to his election. Being already liable by his contract, he can be discharged only by satisfaction of it, by himself or another. So the principal has no right to compel the creditor to elect his action, or to discharge either himself or his agent, but can defend his agent only by making satisfaction for him."

In *McLean v. Sexton*, 44 N. Y. App. Div. 520, after quoting with approval the rule in *Pollock's Contracts* that the other party may sue either principal or agent or may commence proceedings against both, but may sue only one of them to judgment, it is said: "If they may be sued in separate actions, there is no good reason why both the principal and agent who are liable for a debt should not be sued in the same action. Both will be discharged by the satisfaction of the debt, and neither can be discharged without it."

<sup>1</sup> *Paige v. Stone*, 10 Metc. (Mass.) 160; *Wilkins v. Reed*, 6 Greenl. (Me.) 220;

of the states, however, the paper is not presumptively payment, and such a conclusion would not follow.<sup>1</sup> In a case<sup>2</sup> in Massachusetts, where a note is presumptively payment, the court said:

"If the plaintiff, knowing O. to be the agent of the defendant, accepted his note in payment for property sold to the defendant, intending to receive it as payment and to give exclusive credit to O., it would operate as payment; and he could not thereafter fall back upon the defendant for the price of the property, although the note of O. should be dishonored."

This, however, was not a case of undisclosed principal at all, but of election between a known principal and a known agent tendering his individual responsibility, — a case which may be analogous but is not identical. In a similar case<sup>3</sup> in Missouri, where a note is held to be not presumptively payment,<sup>4</sup> it was said that

"where the creditor with knowledge of the principal's liability sees fit to take the individual note of the agent, without taking, at the time of the transaction, any steps indicative of an intent to hold the principal, this is equivalent to a discharge of the principal as a matter of law."

Considering that these two rules were inconsistent, the court in a later case suggested that the conclusion in the agency case might perhaps be regarded as an exception to the previous more general rule.<sup>5</sup>

On the principle of election suggested, while the taking of the agent's note may have some effect as evidence, it is difficult to see why, unless actually taken as payment, it should operate as matter of law to discharge the principal.

*Charging Goods to Agent.* — *A fortiori* would there be no release merely because the goods were charged, or a bill made out, to the agent after the discovery of the principal.<sup>6</sup>

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French v. Price, 24 Pick. (Mass.) 13; Green v. Tanner, 8 Metc. (Mass.) 411; Chapman v. Durant, 10 Mass. 47; Tudor v. Whiting, 12 Mass. 212.

<sup>1</sup> See Atlas S. S. Co. v. Colombian Land Co., 42 C. C. A. 398, where the question is fully discussed though the case was not really one of undisclosed principal; Rathbone v. Tucker, 15 Wend. (N. Y.) 498; Muldon v. Whitlock, 1 Cow. (N. Y.) 290.

<sup>2</sup> Perkins v. Cady, 111 Mass. 318.

<sup>3</sup> Ames Packing & Prov. Co. v. Tucker, 8 Mo. App. 95.

<sup>4</sup> Commiskey v. McPike, 20 Mo. App. 82.

<sup>5</sup> Schepflin v. Dessar, 20 Mo. App. 569.

<sup>6</sup> Dyer v. Swift, 154 Mass. 159; Gardner v. Bean, 124 Mass. 347; Rodliff v. Dallinger, 141 Mass. 1.



§ 25. *Intermediate Party must have been Agent and not Principal.* — Where it is sought to hold one as undisclosed principal, for example for goods bought, it is essential that the intermediate party through whom the goods were secured shall have been an agent of the principal sought to be held and not his vendor.<sup>1</sup> Thus, for illustration, if A orders goods of B as seller, but B, not happening to have them on hand, buys them in his own name of C and supplies them to A, A will not be liable to C as undisclosed principal if B fails to pay C. A would not be liable to C in such a case if he had been disclosed. There was no agency and no principal disclosed or undisclosed.

The same doctrine would, of course, apply to other cases than the sale of goods, — to leasing, borrowing, employing, and the like.

§ 26. *Alleged Agent must have been really such.* — It must be kept in mind that the rules here considered contemplate the actual existence of authority from a principal, though he be not disclosed.<sup>2</sup> There is no more warrant for holding an undisclosed party liable for acts which he did not authorize than there is for holding a disclosed party in such a case. In fact there is often much less warrant. It is therefore an indispensable part of the plaintiff's case to show that the alleged principal was really such.

It must also usually appear that the fact that the undisclosed principal was undisclosed was not in violation of his authority or consent. An authority to buy goods, for example, in the principal's name and upon his credit only, can ordinarily not be deemed to warrant a purchase in the agent's name and upon his credit. It is, of course, true that custom or the distinction between instructions and authority<sup>3</sup> may affect the matter, but in the absence of some element of that nature the rule must be as stated.

Where goods are bought upon credit, it must also be usually a part of the plaintiff's case that a purchase upon credit was authorized, subject to the qualifications mentioned in the preceding paragraph. A principal who supplies an agent with funds with which to buy and pay for goods cannot, it is held, ordinarily be made liable where the

<sup>1</sup> See *Stoddard v. Ham*, 129 Mass. 383.

<sup>2</sup> *Moline v. Neville*, 38 Neb. 433; *Harper v. Sinclair*, 7 Wash. 372.

<sup>3</sup> Thus, in the converse case, it is held that the principal may be liable, although he instructed the agent to buy in his (the agent's) own name, the seller being ignorant of the special instructions. *Perth Amboy Mfg. Co. v. Condit*, 21 N. J. L. 659. See also *Calder v. Dobell*, L. R. 6 C. P. 486.

agent, concealing the principal, buys the goods upon his own credit and makes some other disposition of the money.<sup>1</sup>

Moreover, there can ordinarily in such a case be no ratification of which the other party may avail himself, in view of the rule denying ratification by an undisclosed principal.

§ 27. "*Apparent*" Authority. — Granting that an agency actually exists, it is held that the usual incidents attach to it, and, among others, that the undisclosed principal is liable for acts which fall within the usual scope of such an agency, even though the principal may have given private instructions to the contrary. Thus where the defendants put an agent in charge of their business to be carried on in his own name, and gave him authority to buy certain classes of goods but instructed him not to buy other classes which they would furnish themselves, it was held that defendants were nevertheless liable to the plaintiff for the price of goods of the forbidden class bought by the agent, although the plaintiff at the time of the sale knew nothing of the agency and supposed the agent to be the principal.<sup>2</sup> Wills, J., said:

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<sup>1</sup> *Laing v. Butler*, 37 Hun (N. Y.) 144; *Fradley v. Hyland*, 37 Fed. 49.

<sup>2</sup> *Watteau v. Fenwick*, [1893] 1 Q. B. 346.

*Edmunds v. Bushell*, L. R. 1 Q. B. 97, was relied upon, where Cockburn, C. J., said: "If a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority."

*Watteau v. Fenwick* is followed in *Brooks v. Shaw*, 197 Mass. 376.

A similar conclusion had previously been reached in *Hubbard v. Tenbrook*, 124 Pa. 291 (1889). In this case an agent had been put forward to manage a business apparently as owner but with instructions not to buy goods on credit. He did so buy of plaintiff, and his principal was held liable. Mitchell, J., said: "We have thus the question presented whether an agent can be put forward to conduct a separate business in his own name, and the principal escape liability by a secret limitation on the agent's authority to purchase. The answer is not at all doubtful. A man conducting an apparently prosperous and profitable business obtains credit thereby, and his creditors have a right to suppose that his profits go into his assets for their protection in case of a pinch or an unfavorable turn in the business. To allow an undisclosed principal to absorb the profits, and then when the pinch comes, to escape responsibility on the ground of orders to his agent not to buy on credit, would be a plain fraud on the public. No exact precedent has been cited. None is needed. The rule so vigorously contended for by the plaintiff in error that those dealing with an agent are bound to look to his authority is freely conceded, but this case falls within the equally established rule that those clothing an agent with apparent authority, are, as to parties dealing on the faith of such authority, conclusively estopped from denying it."

*Hubbard v. Tenbrook* was followed in *McCracken v. Hamburger*, 139 Pa. 326; *Ernst v. Harrison*, 86 N. Y. Supp. 247; *Lamb v. Thompson*, 31 Neb. 448; *Patrick v. Grand Falls Merc. Co.*, 13 N. Dak. 12. *Napa Valley Wine Co. v. Cassanova*, 122



"Once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies — that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority — which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent, and then discovering that he was an agent and had a principal."

A number of other cases have adopted similar views, as will be seen from the note.

This doctrine, however, has been severely criticised,<sup>1</sup> and it can

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N. W. 812 (Wis.); *Mississippi Valley Const. Co. v. Abeles*, 87 Ark. 374; and *Allison v. Sutlive*, 99 Ga. 151, are to the same effect.

<sup>1</sup> For example, by Mr. Ewart in his book on Estoppel, pp. 246-248; by the *Solicitor's Journal*, vol. 37, p. 280. It is doubted in 9 *Law Quarterly Review*, p. 111.

The court in *Watteau v. Fenwick* did not cite, or apparently have their attention called to, *Miles v. McIlwraith*, 8 App. Cas. 120 (1883), and although the precise issue was not the same the general question was similar, and there is much in the opinions in the cases not easy to reconcile. *Miles v. McIlwraith* was an action for a penalty brought under a statute imposing penalties upon any one who being in the public service should be interested in a public contract. Defendant was a member of a colonial legislature. The colony was about to lease boats. Defendant was part owner of a number of steamships for which a certain firm (the agents herein) were agents. This firm proposed to offer boats to the government, and, in order not to involve defendant, he required the agents not to offer any ships in which he was interested as part owner. With reference to one ship in particular it was agreed that the agents should lease her at a rent independent of any they might obtain on a lease to the government. In violation of the directions the agents leased this ship to the government on behalf of the owners and in such form as would bind defendant as one of them. The colonial agent who acted for the government did not know of defendant's connection with the boat. It was contended that defendant had violated the statute and was subject to the penalty. But it was held that as defendant would not have been liable to the government (since the agents violated the instructions and there was no apparent authority to bind the defendant, as he was unknown) the defendant was not amenable to the statute. A distinction may be made here upon the ground that the business done was not so done with the consent of the alleged principal.

In *Becherer v. Asher*, 23 Ont. App. 202 (1896), *Watteau v. Fenwick* and *Miles v. McIlwraith* were considered, and it was held that undisclosed principals who had employed an agent to carry on business (in a store rented by him) for the sale of their goods in his name (his authority being limited to the sale of goods supplied by his principals and his compensation being what he obtained for them above invoice prices), were not liable for goods purchased by him in his own name and which he added to

clearly not be sustained upon the ordinary principles of estoppel. It has been thought by some to be merely one more extension of a confessedly anomalous principle; but if the doctrine of the liability of an undisclosed principal is to be adopted at all, there seems to be no unreasonable extension of it in holding that if a principal actually puts forward an agent to act as ostensible principal in a certain position, he should be held responsible for all the acts which such a position usually and naturally justifies, regardless of what his private instructions may have been. The doctrine of necessary and usual powers does not rest upon estoppel.

§ 28. *Excluding Principal's Liability by Terms of Contract.* — In *Humble v. Hunter*,<sup>1</sup> where by the terms of the contract, one who was actually an agent but ostensibly a principal described himself in a charter-party as the owner, it was held that the undisclosed principal could not sue upon the contract. Lord Denman said, "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract." In *Kayton v. Barnett*<sup>2</sup> it was held that the undisclosed principal could be held, even though, at the time of making the contract, the plaintiff had inquired if the defendant was really the buyer and had declared that he would not sell the goods if that was the fact. Notwithstanding this declaration, said the court, the plaintiff did in fact sell the goods to the defendant, although he did not know that he was doing so; and it did not now lie in defendant's mouth to assert that he was not liable because he had succeeded in inducing the plaintiff to do that which he did not intend to do. This case does not fall within Lord Denman's reason, because the plaintiff here was not deprived of any benefit which he may have contemplated from the personality of the party with whom he ostensibly dealt, — he still had that, and the only question was whether he might also avail himself of the fact that defendant was the principal.

But other questions arise. May the terms of the negotiation be used

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the stock in the store. *Watteau v. Fenwick* was distinguished on the ground that there the agent had authority to purchase certain goods though he was instructed not to buy any of the sort which he did buy, but here he had no authority to buy any goods at all. One of the judges said he thought that *Watteau v. Fenwick* was well decided; another said, "It has been sharply criticised, and, it would seem, not without reason."

<sup>1</sup> 12 Q. B. 310. Compare *Schmaltz v. Avery*, 16 Q. B. 655; *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Harper & Co. v. Vigers*, [1909] 2 K. B. 549. *Humble v. Hunter* is followed in *Moore v. Cement Co.*, 121 N. Y. App. Div. 667.

<sup>2</sup> 116 N. Y. 625.



to show that the real agent was not dealt with as an agent at all, but was the actual as well as the ostensible principal? If so, there was no agency and no undisclosed principal, and hence no room for the application of the doctrine under consideration.<sup>1</sup> Suppose, also, that in a formal contract it is made a term that no undisclosed person shall acquire rights or be subject to liability thereon. May it afterward be asserted that there was, nevertheless, an undisclosed principal who may be made liable?

§ 29. *Other Questions.*—Several other questions may be raised which it is not within the scope of this paper to discuss. Suppose that, before the principal is discovered, the agent has performed the contract in whole or in part, but that such performance is not as beneficial to the other party as performance by the principal would be. May the other party, by repudiating, and restoring what he has received, now call upon the principal to perform? Suppose that, before the principal is discovered, the other party and the agent have united to cancel the contract. May the other party, lapse of time and change of position not being involved, now insist upon performance by the principal? Suppose that for some reason personal to the agent, *e. g.*, a prohibitory statute, the contract as made is unenforceable against the agent but would be enforceable against the principal. May the other party enforce the contract against the principal? In an action against the principal may he avail himself of defenses of which the agent might have taken advantage if the action had been brought against him?

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<sup>1</sup> This is apparently the view of the lower court in *Kayton v. Barnett*, 54 N. Y. Super. Ct. 78.

## AN AMBIGUITY IN THE NEGOTIABLE INSTRUMENTS LAW.

WHEN it is considered how carefully the Negotiable Instruments Law has been examined by critics,<sup>1</sup> and how long the practical working of the Act has been tested, it may seem odd to discover now an ambiguity in a section of the statute which involves a question arising every week in the business of every large bank. But such a discovery emphasizes the difficulty under which the draftsman of a statute labors in attempting to foresee all questions that may arise and in expressing clearly the rule which he wishes to have enacted.

A section of the Negotiable Instruments Law which has recently been found to be either ambiguous or to mean something which bankers have not suspected until recently is section 85. This section is as follows:

"Section 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. *Instruments falling due on Saturday are to be presented for payment on the next succeeding business day*, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday."<sup>2</sup>

The words in the section which have been italicised are those to which the following discussion relates; they are contained in the Draft as recommended by the Commissioners of Uniform State Laws, and have been adopted in the law as enacted in most of the states.<sup>3</sup>

<sup>1</sup> See the articles by Professor Ames, 14 HARV. L. REV. 241, 442, and the article by Mr. McKeehan, 41 AMER. LAW REG. N. S. 437, 439, 561. These articles together with defenses by Judge Brewster on the points criticized are reprinted in Professor Brannan's work on the Negotiable Instruments Law.

<sup>2</sup> This section is numbered as section 145 in the New York Statute, and in Mr. Crawford's book which reprints the statute as enacted in New York. It is enacted in the Massachusetts Revised Laws as Section 102 of Chapter 73.

<sup>3</sup> In a few states changes have been made. Arizona, Kentucky, and Wisconsin omit the clause altogether. In Colorado the following words have been substituted:



It has been the practice of banks at least in the cities of New York and Boston, since the enactment of the Negotiable Instruments Law, to present on the following Monday all notes or bills whose date of maturity falls on Saturday. No presentment of such paper has been made, customarily, on Saturday. The propriety of this procedure was called in question in a case which arose not long ago in Boston. A large issue of interest-bearing notes of a railroad company was held by a trust company. By their terms these notes matured on Saturday and were payable at a specified bank in Boston. On the Saturday when the notes matured the railroad company had on deposit in the bank, where the notes were payable, sufficient funds for their payment. The notes were not presented until the following Monday, and when presented interest was demanded to the day of presentment. The bank, however, declined to pay interest for the interval between Saturday and Monday.

By the provisions of the Negotiable Instruments Law<sup>1</sup> where an instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor, and further, by another section,<sup>2</sup>

"If the instrument is by its terms payable at a special place and he [the person primarily liable] is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part."

It was claimed by the bank at which the notes in question were payable, that the notes were due on Saturday and that the presence of funds in the bank where the notes were payable operated as

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"Instruments falling due on any day, in any place where any part of such day is a holiday are to be presented for payment on the next succeeding business day." In New York the year after the enactment of the Negotiable Instruments Law the words "or becoming payable" were inserted after the words "falling due." This change has been copied in Kansas. In Massachusetts this clause of the statute as originally passed was identical with the draft recommended by the Commissioners on Uniform State Laws, but the Commissioners who prepared the Revised Laws of Massachusetts inserted the words "or payable" after the words "falling due," and the New Hampshire statute has followed the form of the Massachusetts Revised Laws. The insertion of the words "becoming payable," or "or payable," seems to have been made on the assumption that the words "falling due" meant something other than "becoming payable." This assumption seems unfounded. — See Mr. Crawford's note to section 145 of his book on the Negotiable Instruments Law.

<sup>1</sup> Section 87; Crawford's Neg. Inst. Law, § 147; Mass. Rev. Laws, c. 73, § 104.

<sup>2</sup> Section 70; Crawford's Neg. Inst. Law, § 130; Mass. Rev. Laws, c. 73, § 87.

a tender of payment and therefore stopped the running of interest. The large amount of the notes involved made the question of interest for even two days one of consequence, but even more serious cases may be supposed involving the same question. A note maturing on Saturday may be held by a bank for collection for a correspondent. In accordance with the custom which has been prevalent the collecting bank would make no presentment until Monday. It may be supposed that on Saturday the note would have been paid had presentment been made, but that owing to supervening bankruptcy, or other cause, the note is dishonored when presented on Monday. If the note was legally due on Saturday the collecting bank has been guilty of negligence and is liable to its correspondent. The same question may be raised in determining when a right to interest accrues upon a note which matures on Saturday, and which does not bear interest according to its terms.

The case of the railroad notes alluded to above was submitted to the counsel both of the railroad and of the trust company. The lawyers consulted agreed in the opinion that the trust company was not entitled to interest after the Saturday on which the notes matured. In support of this conclusion it was pointed out that by the terms of the Negotiable Instruments Law<sup>1</sup> presentment for payment is not necessary to charge the maker, and that the provisions in regard to presentment seem to relate to the steps necessary for charging indorsers and other persons secondarily liable. Furthermore, if it had been the intent of the statute to make a note maturing on Saturday for all purposes like a note maturing on Monday, the second sentence of section 85 would probably have been framed so as to read "when the day of maturity falls upon Saturday or Sunday, or a holiday, the instrument is payable on the next succeeding business day." The contrast between the words "*when the day of maturity falls upon Sunday or a holiday*" as used in the second sentence of the section with the words in the third sentence, "Instruments *falling due* on Saturday," is a strong indication that the words "falling due" mean something other than having the day of maturity fall upon Saturday. That is, the words do not mean as the words in the preceding sentence do, falling due according to the literal tenor of the instrument, but according to its legal effect. A slight additional argument also may be built upon the failure to mention Saturday

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<sup>1</sup> Section 70; Crawford's Neg. Inst. Law, § 130; Mass. Rev. Laws, c. 73, § 87.



in a subsequent section of the Act which provides that "Where the day, or the last day, for doing any act herein required or permitted to be done falls on a Sunday or on a holiday, the act may be done on the next succeeding secular or business day."<sup>1</sup>

On the other hand it was urged on behalf of the trust company that the uniform custom of banks, since the enactment of the Negotiable Instruments Law, had been to treat instruments maturing on Saturday as if they were payable on Monday. The anomaly was also strongly urged of regarding a note as dishonored by the maker so far as his own liability was concerned on Saturday, when, so far as the liabilities of parties secondarily liable was concerned, the maker had not dishonored the note, and could not dishonor it until Monday. An action brought against the maker on Monday morning would then not be premature, though so far as the indorsers were concerned the maker had not yet dishonored the note. The law merchant prior to the Negotiable Instruments Law certainly contained no precedent warranting such a result. The practical inconvenience which would follow from the construction given by counsel to the statute was also noticed. If that construction is sound every instrument falling due on Saturday and bearing indorsements must be presented on Monday in order to charge the indorsers, but in order to start interest running, and in order to make sure that no chance of securing payment is lost, presentment must also be made on Saturday, if the instrument is by its terms payable at a particular place.

Though the question is not free from doubt, since clear language must be required to justify a result which is certainly an anomaly in the law of negotiable paper, yet on the whole the construction given by the eminent counsel consulted in the matter seems sound. The opinion of Mr. Crawford is in conformity with this view, although he does not seem to have perceived the anomalous result of not only authorizing but requiring presentment for payment in order to charge indorsers on a day other than that on which the instrument was legally due.<sup>2</sup>

The legal situation in regard to the matter caused such uneasiness to certain bankers in Boston that the question was presented by the Clearing House Committee to their counsel, who gave the following opinion:

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<sup>1</sup> Section 194; Crawford's Neg. Inst. Law, § 5; Mass. Rev. Laws, c. 78, § 210.

<sup>2</sup> Crawford's Neg. Inst. Law, 3 ed., p. 110, § 145, note (a).

"The language of the statute is not clear, and until it has been construed by the Supreme Court of this Commonwealth we think that the only safe course for a bank to pursue, which holds a note falling due on Saturday, is to present it for payment on Saturday, so as to protect itself from any claim for negligence by the holder, if the bank at which it is payable should have funds applicable to its payment on that day. If payment is refused on Saturday, the collecting bank should present it again for payment on Monday so as to charge the indorsers, who are entitled to a presentment on that day."

In consequence of this opinion the Clearing House Committee instructed their counsel to prepare an amendment to the law with a view to make it both free from ambiguity and in conformity with banking custom. Accordingly in the present session of the Massachusetts Legislature the section under discussion has been amended so that the portion relating to instruments falling due on Saturday reads as follows:

"When the day of maturity falls upon Saturday, Sunday or a holiday, the instrument is payable on the next succeeding business day which is not a Saturday. Instruments payable on demand may at the option of the holder be presented for payment before 12 o'clock noon on Saturday when that entire day is not a holiday; provided, however, that no person receiving any check, draft, bill of exchange, or promissory note payable on demand shall be deemed guilty of any neglect or omission of duty or incur any liability for not presenting for payment or acceptance or collection such check, draft, bill of exchange or promissory note on a Saturday; provided, also, that the same shall be duly presented for payment or acceptance or collection on the next succeeding business day."<sup>1</sup>

*Samuel Williston.*

CAMBRIDGE, MASS.

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<sup>1</sup> Chap. 417.



MISTAKE OF FACT AS A GROUND FOR  
AFFIRMATIVE EQUITABLE RELIEF.

EQUITY, in a proper case, will relieve from mistake. Mistake may be a ground for affirmative relief.<sup>1</sup> It may be a defense to specific performance.<sup>2</sup> As a ground for affirmative relief, mistake is often placed in the same category with accident and fraud. All three have the common characteristic that each, when established in the legal sense, creates an inequality between the parties which will move the discretion of the Chancellor to action. Moreover, there is no bright line which divides mistake from either fraud or accident. Yet mistake is distinguishable from both. Accident creates a change in the actual situation of the parties — as destruction of the subject matter of a bargain by the act of God. It contains no mental element. Mistake, on the other hand, leaves the actual facts untouched. It involves affirmative action by the human mind. It consists in forming an incorrect mental picture of the situation. If this incorrect mental picture is caused by the unlawful representations or unlawful silence of another human being, the case passes from the realm of mistake into the realm of fraud. The presence of the mental ingredient, then, is the striking difference between accident and mistake. Fraud, on the other hand, consists of mistake plus a further element, the unlawful causing of the error by some person different from the person who labors under the mistake. Broadly speaking, then, if the error is the work of the party who labors thereunder the case is one of mistake. But, if the incorrect mental picture be due to the unlawful silence or the unlawful representations of some third party, this further element of third party causation makes the case one of fraud. For this reason equity is slower to relieve from mistake than from fraud. The fact that the party who sets up the mistake is the party responsible therefor makes it necessary for him to show special and peculiar grounds for relief.

Mistake of law is to be distinguished from mistake of fact. A mistake of law arises when a party is accurately informed, either

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<sup>1</sup> 16 Cyc. 68, note 1.

<sup>2</sup> See Fry, *Specific Performance*, 4 ed., p. 329, and p. 522 *et seq.*

actually or constructively, of the facts, but reaches an erroneous conclusion with respect to the legal rights growing out of those facts. A mistake of fact arises when a party forms a conception of the facts which differs from the facts as they really exist. The principle is clear enough, but the application to given cases is a matter of great nicety which is beyond the scope of this article. Here it is enough to say that, while the general rule is that equity will not relieve from a mistake of law,<sup>1</sup> such relief has been given,<sup>2</sup> and some courts have been very ingenious in discovering exceptions to the rule itself.<sup>3</sup>

Mistake of fact, then, is a ground for affirmative equitable relief.<sup>4</sup> But equity will not relieve from every species of mistake of fact. The mistake must be appropriate to the relief sought, and must bear the right relation to the parties and to the subject matter. Mistake of fact, must, therefore, be classified with respect to the relief at the Chancellor's disposal, with respect to the parties, and with respect to the subject matter.

Naturally, the relief, if relief be given, must reach the mistake. But the rule works both ways. Where particular relief is sought, the mistake must justify that relief.<sup>5</sup> Analysis of the relief which may be given is, therefore, a partial analysis of the kind of mistake which is ground for relief. Broadly speaking, the Chancellor has at command two kinds of affirmative relief. He may rescind the bargain or transaction, or he may reform the writing in which the bargain or transaction is intended to be expressed, provided that there is such a writing. The word "rescind" is here used in the broad sense, and includes cancellation and surrender up.<sup>6</sup> The statement of the two broad species of relief brings out one striking and basic difference between them. Rescission deals with the subject matter of the bargain or transaction: reformation deals with writings only. But a bargain is born of a meeting of minds upon the subject matter thereof. To be ground for rescission, the mistake must touch the subject matter of the bargain.<sup>7</sup> If it be collateral to the bargain, no rescission can be given.<sup>8</sup> On the other hand, reformation leaves the bargain un-

<sup>1</sup> 16 Cyc. p. 73, note 36.

<sup>2</sup> *Griswold v. Hazard*, 141 U. S. 260. See 16 Cyc. p. 73, note 37.

<sup>3</sup> 16 Cyc. p. 74.

<sup>4</sup> 16 Cyc. p. 68, note 1.

<sup>5</sup> *Truesdell v. Sarles*, 104 N. Y. 164.

<sup>6</sup> 6 Cyc. p. 285.

<sup>7</sup> *Hurd v. Hall*, 12 Wis. 112; *Strickland v. Turner*, 7 Exch. 208.

<sup>8</sup> *Hecht v. Batcheller*, 147 Mass. 335; *McCobb v. Richardson*, 24 Me. 82; *Wood v. Boynton*, 64 Wis. 265; *Stewart v. National Bank*, 104 Me. 578.



touched. To be ground for reformation, the mistake must intervene between the creation of the bargain and the reduction of it to writing, and must touch the writing only.<sup>1</sup> If the writing be exactly what the parties intended, there can be no reformation.<sup>2</sup> It follows, then, that one who seeks rescission must establish a mistake of the proper character which touches that on which the minds of the parties met; if he seeks reformation, he must establish a mistake in respect of the writing only.

Another principle in regard to reformation brings out this distinction very clearly. To obtain reformation, the plaintiff must establish some standard to which the writing may be reformed. But, when the writing is intended to express a transaction founded on valuable consideration, nothing less than a valid and enforceable bargain will serve as a standard.<sup>3</sup> Equity cannot make a contract for the parties. True, the Chancellor may cast into prison the body of one in contempt. Once he was supposed to have power to damn the soul of a disobedient defendant. But he never has claimed jurisdiction over the human mind. A valid bargain is born of a meeting of minds. If the minds of the parties never met, there is no bargain to which the writing can be reformed.<sup>4</sup> Reformation, then, is an affirmation of the bargain as it was actually made.<sup>5</sup> Rescission, on the other hand, is a disaffirmance of the bargain itself. It is the antithesis of reformation. Consequently, a mistake which is ground for reformation will not justify rescission in any ordinary case; while a mistake which is ground for rescission will not justify reformation, since it strikes at the bargain which must serve as the standard for reformation.<sup>6</sup>

<sup>1</sup> *Page v. Higgins*, 150 Mass. 27; *Ledyard v. Hartford Ins. Co.*, 24 Wis. 496.

<sup>2</sup> *Andrew v. Spurr*, 8 Allen (Mass.) 412; *Whittemore v. Farrington*, 76 N. Y. 452; *Braun v. Wis. Rendering Co.*, 92 Wis. 245; *Auer v. Mathews*, 129 Wis. 143.

<sup>3</sup> *Gun v. McCarthy*, L. R. Ir. 13 Ch. D. 304; *Petesich v. Hambach*, 48 Wis. 443; *Moehlenpach v. Mayhew*, 138 Wis. 561; *Glass v. Hulbert*, 102 Mass. 24; *Peirce v. Colcord*, 113 Mass. 372; *United States v. Milliken Co.*, 202 U. S. 168; *Fulton v. Colwell*, 112 Fed. 831.

<sup>4</sup> *Page v. Higgins*, 150 Mass. 27; *Gun v. McCarthy*, L. R. Ir. 13 Ch. D. 304; *Ledyard v. Hartford Ins. Co.*, 24 Wis. 496. Cf. *Raffles v. Wichelhaus*, 2 Hurl. & Colt. 906; *Ionides v. Pacific, etc. Ins. Co.*, L. R. 6 Q. B. 674; *Hickman v. Bereus*, 1895, 2 Ch. 638.

<sup>5</sup> *Pfeiffer v. Marshall*, 136 Wis. 51. But some courts permit a bill which seeks reformation, or, in the alternative, cancellation. *Gun v. McCarthy*, L. R. Ir., 13 Ch. D. 304. Though it has been held improper to reform an absolute deed into a mortgage, where the relief sought by the bill was rescission. *Truesdell v. Sarles*, 104 N. Y. 164.

<sup>6</sup> *Laver v. Dennett*, 109 U. S. 90; *R. R. Co. v. Steinfeldt*, 42 Oh. St. 449; *Trues-*

Mistake, when classified with respect to the parties thereto, is either unilateral or mutual. A unilateral error is confined to one party only. A mutual mistake is a mistake common to both parties. But two different mistakes with respect to the same bargain do not make a mutual mistake. The same error must be shared by both parties in order to render the error mutual. In this respect mutual error resembles mutual assent. Unless the minds of the parties meet on the subject matter of the bargain, there is no mutual assent thereto.<sup>1</sup> Unless the minds of the parties fall into the same misconception with respect to that bargain, there is no mutual error.<sup>1</sup> At best, there is simply a pair of unilateral mistakes.<sup>1</sup>

Perhaps two illustrative cases will make this point clear. In *Page v. Higgins*,<sup>2</sup> the plaintiff agreed to buy of the defendant "all the land owned by the defendant east of the stone wall." The plaintiff understood this to include the Cheever lot, the defendant understood this to omit the Cheever lot, which he did not own. The plaintiff drew the deed, describing the land conveyed by metes and bounds, and in good faith included the Cheever lot therein. The defendant failed to discover that the Cheever lot was included. This action was brought on the covenant of seisin in the deed. The defendant (by statute) set up what in effect amounted to a claim for reformation. *Held*, that a judgment for defendant must be reversed, since the evidence shows two different mistakes, and not a common or mutual mistake — the error of the plaintiff being as to the meaning of the original agreement, the error of the defendant being as to the contents of the deed. In *Ledyard v. Hartford, etc. Ins. Co.*,<sup>3</sup> the plaintiff requested insurance upon certain furniture in building number 1; the insurance agent understood that the furniture was in building number 2, and so drew the policy. Building number 1 burned with the furniture. Plaintiff seeks reformation of the policy, so that it should describe the furniture as in building number 1. *Held*, that, since the evidence shows two unilateral mistakes as to the bargain, and no

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dell v. Sarles, 104 N. Y. 164. But see *Abbott v. Dow*, 133 Wis. 533. Here the minds of the parties met on an agreement to purchase lot 1; by mutual mistake, the writing described lot 2. Before the mistake was discovered, the defendant conveyed lot 1 to a purchaser for value and without notice. On discovery of the mistake, the plaintiff sought rescission and recovery of moneys already paid down. *Held*, that, while the usual relief would be reformation, rescission will be here granted in view of the inability of the defendant to perform the original agreement because of his innocent conveyance of lot 1.

<sup>1</sup> See *supra*, note 4.

<sup>2</sup> 150 Mass. 27.

<sup>3</sup> 24 Wis. 496.



mutual mistake as to the writing, reformation cannot be given. These cases, then, show that, where each party labors under a different mistake, the two different mistakes cannot be combined to make a mutual or common mistake.

A mistake by one party, coupled with ignorance thereof by the other party, does not constitute a mutual mistake.<sup>1</sup> Thus, if the minds of the parties meet on the subject matter of the bargain, but one party enters into the bargain under a mistake, and the other party enters into the bargain in ignorance of the mistake, or in the belief that no mistake has been made, there is no mutual error. Two recent cases illustrate this very nicely. In *Steinmeyer v. Schroepfel*,<sup>2</sup> the defendant requested a bid from the plaintiff upon certain items of lumber. The plaintiff's clerk set down these items on a piece of paper, with the price of each item marked against it. The plaintiff's partner added the items incorrectly. The plaintiff adopted the erroneous total and made a written offer to supply the lumber for that sum, which was some four hundred dollars short of the correct total. This offer the defendant accepted in good faith. On discovery of the mistake, the plaintiff brought a bill in equity to rescind the contract. The court below granted this relief. The Supreme Court of Illinois reversed the judgment upon the ground that the mistake was not mutual. Another case, very like the last, is *Grant Marble Co. v. Abbot*.<sup>3</sup> In this case, the plaintiff made a written offer to install marble in all six stories of the defendant's building for \$24,150. In making this offer, the president of the plaintiff company used certain figures furnished by a subordinate, supposing that they covered the work in all six stories. In truth, they only covered five stories. The defendant accepted the offer in ignorance of the mistake. On discovery of the mistake, the plaintiff sought relief in equity, and the court below rescinded the bargain. The Supreme Court of Wisconsin held that the mistake was not mutual and reversed the judg-

<sup>1</sup> *Moffett, etc. Co. v. Rochester*, 91 Fed. 28 (reversed on another ground in 178 U. S. 373); *Dewey v. Whitney*, 93 Fed. 533; *Comer v. Granniss*, 75 Ga. 277; *Griffin v. O'Neil*, 48 Kan. 117; *Steinmeyer v. Schroepfel*, 226 Ill. 9; *McCormack v. Lynch*, 69 Mo. App. 524; *Benn v. Pritchett*, 163 Mo. 560; *Wilson v. Western Land Co.*, 77 N. C. 445; *Brown v. Levy*, 29 Tex. Civ. App. 389; *Coates v. Buck*, 93 Wis. 128; *Grant Marble Co. v. Abbot*, 124 N. W. 264 (Wis., 1910). Another familiar instance of the same principle is the case where a surety is induced to make the contract by the fraud of the principal debtor, but the fraud is unknown to the creditor. See *post*, p. 624, note 3.

<sup>2</sup> 226 Ill. 9.

<sup>3</sup> 124 N. W. 264 (Wis., 1910).

ment. These cases, then, emphasize the principle that a mistake is not mutual, unless both parties labor under the same misconception. A mistake by one party, and a belief by the other party, that there has been no mistake, make a pair of different mistakes and not a mutual error.

A mistake, when classified with respect to the subject matter of the contract, is either intrinsic or extrinsic. An intrinsic mistake is defined by Mr. Justice McLean in *Allen v. Hammond*<sup>1</sup> as a "material mistake as to the subject matter of the bargain." Story, J., in *Hammond v. Allen*<sup>2</sup> (the same case in the court below) defines it as "a mistake of fact going to the essence of the contract." In *Kowalke v. The Milwaukee, etc. Co.*,<sup>3</sup> Mr. Justice Dodge says that an intrinsic mistake is a mistake as to "one of the things actually contracted about." An intrinsic mistake, then, is an error with respect to some matter which the parties have made a condition of the bargain. But this does not mean that the condition must of necessity be expressed in words. The acts of the parties and the expressed terms of the bargain may define the condition with sufficient clearness to render an error with regard to it intrinsic. The stock judicial example of such a clearly defined, but seldom expressed, condition is the assumption, by the parties, of the continued existence of the subject matter of the contract. When A and B agree upon the sale of a given horse, they seldom, if ever, say in words: "If this horse is dead, the bargain is off." Yet this is as clearly understood as if expressed. The making of the agreement is, in effect, a statement of this condition. If, at the time the parties made the bargain, the horse was dead, we have a clear example of an intrinsic error.

An extrinsic error, on the other hand, is an error in respect of some matter collateral to the bargain. It may affect the reasons for entering into the contract, or touch some matter of inducement, but it leaves untouched the subject matter or essence of the agreement itself. Thus mistakes as to value or quality are classed as extrinsic mistakes, because they touch neither the existence nor identity of the thing sold, nor the basis of the bargain. Frequently, the parties, if they knew the truth, would not make the agreement which they did make. But this is not the test. The test seems to be, does the mistake affect the basis or understanding on which the parties contracted?

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<sup>1</sup> 11 Pet. (U. S.) 63, 70.

<sup>2</sup> 2 Sumn. (U. S.) 387, 395.

<sup>3</sup> 103 Wis. 472, 477.



If it does, the mistake is intrinsic; if it does not, the mistake is extrinsic. Of course the distinction between intrinsic and extrinsic mistakes is one of great nicety. But it is essentially a question of fact under all the circumstances of the case. It is not surprising, therefore, that, in particular instances, we may find cases on quite similar facts, which have been decided in opposite ways. As we shall see later, an intrinsic mistake is ground for equitable relief,<sup>1</sup> while an extrinsic mistake is not.<sup>2</sup> The burden of showing that the mistake is intrinsic is upon the party who sets it up. He may succeed in one case and not in the other. Perhaps this goes far to explain the somewhat contradictory decisions on the subject.

Certain classes of mistake are clearly intrinsic. A mistake in regard to the identity of the thing contracted for is obviously of the essence. Thus, in *Raffles v. Wichelhaus*,<sup>3</sup> the plaintiff and defendant agreed that the defendant should buy at a certain price one hundred and twenty-five bales of Surat cotton "ex Peerless" from Bombay. There were two ships called the Peerless which sailed from Bombay, and it subsequently appeared that the plaintiff meant the one and the defendant the other. *Held*, an intrinsic mistake which prevented the formation of any contract. It may be noted that the error in *Page v. Higgins*, *supra*, and *Ledyard v. Hartford Ins. Co.*, *supra*, was of similar nature. The parties were not at one as to the subject matter of the bargain. In the same way, if the parties to a sale are not at one as to the identity of the vendee, there is an intrinsic mistake which goes to the validity of the sale.<sup>4</sup> Thus, in *Rodliff v. Dallinger*,<sup>5</sup> one who represented himself as the agent of an undisclosed principal induced the plaintiff to deliver to him goods with intent to pass title thereto to the principal. There was in truth no principal. *Held*, that no title passed. A mistake, then, as to the identity of the subject matter or as to the identity of the parties (if that identity be material)<sup>6</sup> is clearly intrinsic. Also it is usually fatal to the legal validity of the transaction.

<sup>1</sup> See *post*, p. 615, notes 2-5 inclusive.

<sup>2</sup> See *post*, p. 616, notes 1-5 *et seq.*

<sup>3</sup> 2 Hurl. & Colt. 906.

<sup>4</sup> *Cundy v. Lindsay*, 3 A. C. 459; *Boulton v. Jones*, 2 H. & N. 564. *Boston Ice Co. v. Potter*, 123 Mass. 28.

<sup>5</sup> 141 Mass. 1; *Smith Co. v. Stidger*, 18 Col. App. 261; *Rogers v. Dutton*, 182 Mass. 187; *Hamet v. Letcher*, 37 Oh. St. 356, *acc.* But a party may be estopped to set up his error. *Stoddard v. Ham*, 129 Mass. 383; *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392.

<sup>6</sup> See *Smith v. Wheatcroft*, L. R. 9 Ch. D. 223, 230.

While an intrinsic mistake may prevent the formation of the bargain, it need not necessarily do so. The parties may come together both upon the subject matter and the terms of the contract, and yet labor under a mistake which touches the essence. Thus the existence of the subject matter of the agreement is a clearly understood but seldom expressed condition of the transaction.<sup>1</sup> Where the parties bought and sold a cargo at sea, in ignorance of its loss, the error was held to be of the essence and ground for relief.<sup>2</sup> In the same way, if an insurance policy be taken<sup>3</sup> or assigned<sup>4</sup> in ignorance of the death of the insured, the mistake is intrinsic, since the parties contract upon the basis of his continued existence. Similarly, if the parties contract upon a particular understanding with respect to a given fact, there is an intrinsic mistake if the fact be different from the understanding of the parties.<sup>5</sup> Thus, in *Hammond v. Allen*,<sup>6</sup> the plaintiff gave the defendant an irrevocable power of attorney to collect a certain claim against the Portuguese government, the defendant to receive nearly one-third of the claim by way of compensation. At the time of this arrangement both parties were ignorant that the claim had already been allowed by the Portuguese government. *Held*, that the mistake is intrinsic, and ground for rescission. In *Hitchcock v. Giddings*,<sup>7</sup> the plaintiff bought of the defendant the defendant's interest in a certain remainder in fee after an estate tail, both parties understanding that the tenant in tail had not suffered a recovery. In truth, the tenant in tail had suffered a recovery. *Held*, that, since the parties contracted upon the basis that no recovery had been suffered, there is an intrinsic mistake which is ground for rescission. In all these cases, the court came to the conclusion that the parties came to a definite understanding with

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<sup>1</sup> *Lord Clifford v. Watts*, L. R. 5 C. P. 577; *Coturier v. Hastie*, 5 H. L. Cas. 673; *U. S. v. Charles*, 74 Fed. 42; *Scruggs v. Driver*, 31 Ala. 274; *Gibson v. Pelkie*, 37 Mich. 380; *Fritzler v. Robinson*, 70 Ia. 500; *Gribben v. Atkinson*, 64 Mich. 651; *Blake v. Lobbs Estate*, 110 Mich. 608; *Ridgley v. Conewago Iron Co.*, 53 Fed. 988; *Cook v. Andrews*, 36 Oh. St. 178; *Buchanan v. Layne*, 95 Mo. App. 148; *Muhlenberg v. Henning*, 116 Pa. 138. See also *Howell v. Coupland*, L. R. 1 Q. B. D. 258; *Thompson v. Gould*, 20 Pick. (Mass.) 134.

<sup>2</sup> *Hastie v. Coturier*, 9 Exch. 102.

<sup>3</sup> *Pritchard v. Merchants', etc. Assoc.*, 3 C. B. N. S. 622.

<sup>4</sup> *Strickland v. Turner*, 7 Exch. 208; *Scott v. Coulson*, (1903), 2 Ch. 249.

<sup>5</sup> *Fleetwood v. Brown*, 109 Ind. 567; *Sherwood v. Walker*, 66 Mich. 568. But a change in the circumstances may be fatal to relief. *Okill v. Whittaker*, 2 Phillips 338.

<sup>6</sup> 2 Sumn. (U. S.) 387, affirmed in 11 Pet. (U. S.) 63.

<sup>7</sup> 4 Price 135.



respect to the fact as to which they were both in error. It was the existence of this understanding which rendered the mistake intrinsic rather than extrinsic. Of course the condition was not always expressed in so many words. This the court seems to have deemed unnecessary. It seems to have been sufficient that the understanding actually existed. Perhaps the court went a good way in finding a conscious understanding. But this is a question of fact into which it is impossible to enter effectively in the absence of the witnesses and the evidence.

Where the mutual error touches some collateral matter of belief or inducement, as to which there is no understanding, it is extrinsic, and no ground for relief. The difference seems to be one of degree. Have we a belief only, or an understanding? That seems to be the test. Thus questions of value or quality are usually deemed extrinsic.<sup>1</sup> In *Wood v. Boynton*,<sup>2</sup> the parties bought and sold for one dollar a certain stone in the mutual and erroneous belief that it was a topaz. In truth, it was a diamond worth seven hundred dollars. *Held*, an extrinsic error which will not justify a rescission. A case very close to this, but which was decided the other way, is *Chapman v. Cole*.<sup>3</sup> There the plaintiff, being possessed of a gold coin, privately issued in California by one Moffat (and so not legal money), passed it away to B, who passed it to defendant, all parties mistaking it for a fifty-cent piece. *Held*, that the plaintiff may maintain trover for the coin, since, by reason of the error, no title passed to defendant. Again, several cases have held that, where A sells to B (without indorsement) the promissory note of C, both parties being ignorant that C is insolvent, the error is collateral, and no ground for relief.<sup>4</sup> In the same way, where A sold B distant lands under the mutual but erroneous belief that there was valuable timber thereon, the mistake was held incidental to the bargain and insufficient to justify rescission.<sup>5</sup>

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<sup>1</sup> See *Hecht v. Batcheller*, 147 Mass. 335; *Sankey v. First Nat. Bank*, 78 Pa. 48.

<sup>2</sup> 64 Wis. 265.

<sup>3</sup> 12 Gray (Mass.) 141.

<sup>4</sup> *Hecht v. Batcheller*, 147 Mass. 335; *Day v. Kinney*, 131 Mass. 37; *Bicknell v. Waterman*, 5 R. I. 43; *Burgess v. Chapin*, 5 R. I. 225. *Contra*, *Harris v. Hanover Bank*, 15 Fed. 786. But, if the note had been invalid, the error would have been intrinsic. *Hurd v. Hall*, 12 Wis. 112; *Lawton v. Howe*, 14 Wis. 241; *Maldaner v. Beurhaus*, 108 Wis. 25. See also *Gordon v. Irvine*, 105 Ga. 144; *Brown v. Montgomery*, 20 N. Y. 287.

<sup>5</sup> *McCobb v. Richardson*, 24 Me. 82. But *cf.* *Thwing v. Hall & Ducey, etc. Co.*, 40 Minn. 184.

Similarly, where the parties sold and purchased government bonds in ignorance that, by reason of extension of the time of maturity, they commanded a premium, the error was held to be collateral.<sup>1</sup> And where the parties arranged for a water supply from a particular source in ignorance that it would prove insufficient, the mistake was held extrinsic.<sup>2</sup> Again, where the parties bought and sold an incumbrance in the mutual and erroneous belief that it was a first incumbrance, whereas it was really a second incumbrance, the error was held collateral.<sup>3</sup> And where one partner buys out another partner's share, a mistake as to the value of the share was deemed not intrinsic.<sup>4</sup> In all these cases there was a mutual mistake. But the mutual error did not become the basis of the bargain actually made. It touched a reason for the contract, but was not a condition of it. Hence it was no ground for relief.

Mistake, then, has been classified with respect to the relief, with respect to the parties, and with respect to the subject matter. Mistake of the proper character is ground for rescission or for reformation, according to its nature. The two final questions, therefore, are, with respect to the kind of mistake which must be established as a basis for each kind of relief.

Reformation, as has been already shown, deals with the correction of writings. It leaves untouched the substance of the transaction. Indeed, the scope and purpose of it is to make the erroneous writing express the transaction correctly. Usually the transaction is a bargain founded on valuable consideration, but occasionally it is a gift. It is important to distinguish between transactions based on valuable consideration and gifts, since the nature of the transaction determines the requisites for reformation. Where the plaintiff seeks reformation of a writing intended to express a transaction based on valuable con-

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<sup>1</sup> *Sankey v. First Nat. Bank*, 78 Pa. 48.

<sup>2</sup> *Dubois Borough v. Dubois, etc. Co.*, 176 Pa. 430.

<sup>3</sup> *Sample v. Bridgforth*, 72 Miss. 293.

<sup>4</sup> *Dortic v. Dugas*, 58 Ga. 484; *Crowder v. Langdon*, 3 Iredell Eq. (N. C.) 476; *Stettheimer v. Killip*, 75 N. Y. 283; *Brown v. Fagan*, 71 Mo. 563; *Pearce v. Suggs & Pettit*, 85 Tenn. 724. (In the two latter cases the court also invoked the doctrine that equity does not relieve a party from the consequences of his own negligence.) *Klauber v. Wright*, 52 Wis. 303. But it seems that, if an inventory be made, and the parties contract upon the understanding that the inventory is correct, an error in the inventory is an intrinsic mistake which is ground for relief. See *De Voin v. De Voin*, 76 Wis. 66; *Meinecke v. Sweet*, 106 Wis. 21. But cf. *Kaiser v. Nummerdor*, 120 Wis. 234 (Negligence in detecting error).



sideration, he must establish three things with the requisite clearness.<sup>1</sup> First, he must show that the minds of the parties met upon a valid agreement which preceded the making of the writing, and which that writing is intended to express.<sup>2</sup> Second, he must prove the tenor of that prior agreement.<sup>3</sup> Third, he must show that by mutual mistake, or its legal equivalent, the writing fails to set forth the prior agreement correctly.<sup>3</sup> It is not enough to show a mistake by one party only.<sup>4</sup> In such a case, the parties are of equal merit. Neither version of the bargain is entitled to more weight than the other. The purpose of reformation is to prevent an error in reducing the bargain to writing from imposing on the parties a bargain which they never made. To reform for an error by one party only, where the writing correctly expresses the understanding of the other party, would work the very injustice which reformation is intended to prevent. It would impose on one party a bargain to which he never agreed. Yet a mutual error standing alone is not enough to justify reformation; the error must occur in reducing the prior bargain to writing and cause that writing to express the prior bargain incorrectly. The writing should not be reformed simply because it differs from the prior bargain, no matter how clearly this difference is proved. It may be that the parties have consciously modified the original bargain in reducing it to writing. Thus, if a term of the prior bargain be deliberately omitted from the writing, neither may later have this term inserted by reformation.<sup>5</sup> The writing must stand as the parties have chosen to make it. If, then, the writing be intended to embody a transaction founded on valuable consideration, there should be no reformation unless the plaintiff establish with the requisite clearness that, by reason of a mutual mistake, or its equivalent, the writing fails to set forth correctly the bargain on which the parties previously agreed.

There is, however, one equivalent which may be substituted for mutual mistake. Common honesty forbids a man to obtain or per-

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<sup>1</sup> The proof must exceed a preponderance of the evidence and be "clear and satisfactory." *Parker v. Hull*, 71 Wis. 368; *Glocke v. Glocke*, 113 Wis. 303; *Howland v. Blake*, 97 U. S. 624. The unaided testimony of the plaintiff is not enough. *McClellan v. Sandford*, 26 Wis. 595. See also 16 Cyc. 70.

<sup>2</sup> See *ante*, p. 610, notes 3 and 4. Also *Moehlenpah v. Mayhew*, 138 Wis. 561, 573; *Grant Marble Co. v. Abbot*, 124 N. W. 264 (Wis.). See 6 Pomeroy, Eq. Jur. § 675.

<sup>3</sup> *Betts v. Gunn*, 31 Ala. 219; *Andrew v. Spurr*, 8 Allen (Mass.) 412; *Braun v. Wisconsin, etc. Co.*, 92 Wis. 245. See also *Whittemore v. Farrington*, 76 N. Y. 452.

<sup>4</sup> *Kruse v. Koelzer*, 124 Wis. 536. See 6 Pomeroy, Eq. Jur. § 676.

<sup>5</sup> See note 3, *supra*.

fect rights with knowledge that the other party is laboring under a mistake. Equity will not permit him to reap the fruits of his dishonest silence. It will not avail him to say that the error ceased to be mutual because he discovered the mistake which he failed to correct. Such conduct amounts to fraud. If, then, by reason of mistake on the one hand, and knowledge of the error on the other, the writing fails to express the prior bargain correctly, equity will reform just as readily as if there had been mutual mistake.<sup>1</sup> Of course the mistake and fraud must be the cause of the incorrectness of the writing. They must intervene between the bargain and the writing just as mutual mistake must intervene; otherwise reformation is not the proper remedy. If the error and the knowledge thereof precede the making of the bargain, and the writing correctly expresses the agreement as it was actually made, there can be no reformation. The fraud of the defendant does not empower equity to make a bargain for him.<sup>2</sup> Yet the defendant will not be permitted to retain the fruits of his fraudulent conduct. Instead of reforming the writing, equity will rescind the whole transaction,<sup>3</sup> although some cases have given the defendant the option either to consent to reformation or to submit to rescission.<sup>4</sup> On the other hand, mistake and fraud in reducing the prior bargain to writing would not be ground for rescission. The bargain remains valid in spite of the subsequent misconduct of the defendant. The bargain is still a proper standard to which to reform the writing. Consequently the valid bargain should be affirmed by giving reformation.

If, however, the writing be intended to set forth a gift, instead of a transaction based on valuable consideration, the requisites for reformation are different. A gift is in truth a one party transaction. It is true that the donee must assent to the gift; otherwise no title could pass. But he is a passive party. He is simply a willing vessel into which the donor pours his bounty. The parties never intended to contract. If, then, a prior bargain were here required as a condi-

<sup>1</sup> *Essex v. Day*, 52 Conn. 483; *Roszell v. Roszell*, 109 Ind. 354; *Welles v. Yates*, 44 N. Y. 525; *James v. Cutler*, 54 Wis. 172; *Venable v. Burton*, 129 Ga. 537.

<sup>2</sup> *Gun v. McCarthy*, L. R. Ir. 13 Ch. D. 304. See also *Grant Marble Co. v. Abbot*, 124 N. W. 264 (Wis.).

<sup>3</sup> *McCormick v. Miller*, 102 Ill. 208; *Clark v. Clark*, 55 N. J. Eq. 814; *Haviland v. Willets*, 141 N. Y. 35; *Harran v. Foley*, 62 Wis. 584; *Scott v. Coulson*, (1903), 2 Ch. 249; *Paget v. Marshall*, L. R. 28 Ch. D. 255.

<sup>4</sup> *Gun v. McCarthy*, L. R. Ir. 13 Ch. D. 304; *Paget v. Marshall*, L. R. 28 Ch. D. 255; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Stone v. Moody*, 47 Wash. 158.



tion of reformation, reformation could never be given. Yet the reasons for reformation still exist. The writing may not correctly express the terms of the gift. The writing is intended to express the intention of the donor at the time the gift was made. This intention is the model to which the writing should be remoulded, provided that, through mistake, the writing gives more than the donor intended to give. It follows, also, that the error need not be mutual. The donor is the active and ruling party. The donee gives nothing for what he gets. All is clear gain to him. Since he has no voice either in determining the extent of the gift or the terms in which that gift shall be expressed, mutuality of mistake is no essential ingredient of the equities of the case. Reformation, in such a case, imposes no burden upon the donee. It simply decreases the benefit which he would otherwise derive from the donor's generosity. If, then, the donor shows with sufficient clearness that the writing failed to express his real intention at the time he made the gift, he should have reformation,<sup>1</sup> provided, of course, that the situation, at the time he seeks relief, raises no countervailing equity in favor of the donee. It follows, also, that the donor is the only party who can reform. If, through a mistake, the writing fails to include all that the donor intended to give, no equity is thereby raised in favor of the donee, as against the donor. A generous intention on the part of the donor, coupled with an error in reducing that intention to writing, does not create a contract which the donee may specifically enforce. The donee is a volunteer who must take things as he finds them.<sup>2</sup> It is true that there are cases which permit the donee to reform the writing after the death of the donor as against the donor's heirs.<sup>3</sup> But, if the donee had no equity against the donor in the donor's lifetime, it is hard to see how the death of the donor can raise one against those who take what the donor left. Moreover, such an equity seems to fly in the face of the Statute of Wills. The better reasoning seems to be with the cases which deny the donee relief against the heirs or next of kin on the ground that he

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<sup>1</sup> *Andrews v. Andrews*, 12 Ind. 348; *Lister v. Hodgson*, L. R. 4 Eq. 30 (rescission given here); *Day v. Day*, 84 N. C. 408; *Ferrell v. Ferrell*, 44 S. E. 187 (W. Va.); *Mitchell v. Mitchell*, 40 Ga. 11; 6 *Pomeroy*, Eq. Jur. § 679, note 18.

<sup>2</sup> *Shears v. Westover*, 110 Mich. 505; *Powell v. Morisey*, 98 N. C. 426; *Dennis v. Dennis*, 4 Rich. Eq. (S. C.) 307; *Hout v. Hout*, 20 Oh. St. 119; *Willey v. Hodge*, 104 Wis. 81.

<sup>3</sup> *M'Mechan v. Warburton*, L. R. Ir. (1896), 1 Ch. D. 435; 6 *Pom. Eq. Jur.* § 679, note 17.

is a mere volunteer.<sup>1</sup> If, then, the transaction be a gift, the donor should have reformation, if he shows that the writing fails to express his intention at the time he made the gift, but the donee, as a volunteer, should be refused relief, either against the donor or his heirs.

Rescission, as has already been shown, strikes down the bargain itself. Unless the mistake reaches the bargain, it will not justify this species of relief. Moreover, the mistake must be intrinsic.<sup>2</sup> It must touch and concern some matter which is actually a condition of the agreement.<sup>3</sup> An extrinsic error is no ground for relief.<sup>3</sup> An extrinsic error touches some matter of inducement, or some reason for making the agreement. But equity does not relieve a man from his contract because his reasons for making it were bad. To give relief in such a case would work a manifest wrong to the other party. Contracts are made in order to substitute an agreed certainty for the uncertainty of events. Such certainty is what each party pays for. If the bargain be rescinded, each party is remitted to the very uncertainty against which he sought to insure by making the agreement. When A seeks rescission of his agreement upon the ground of mistake, he offers his failure to form a correct mental picture of the situation as a reason why the Chancellor should deprive B of a right for which B has paid a price, the price being the consideration upon which the agreement rests. Of course the error may not be the fault of A. He may have been entirely without negligence in making the mistake. But *he* is the party responsible for the mistake. B may have shared in the error, but he is not the legal cause of it. Where there is no fiduciary relation between the parties, B is under no duty to guard A from error.<sup>4</sup> A must stand on his own feet and accept the consequences of his own acts. If A could escape from his agreement because he was mistaken in his reasons for making it, stability of contract would be destroyed. No contract would be safe. Unless the parties have chosen, either expressly or by implication, to make

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<sup>1</sup> *Powell v. Powell*, 27 Ga. 36; *Enos v. Stewart*, 70 Pac. 1005 (Cal.); and cases cited in p. 620, note 2.

<sup>2</sup> See *ante*, p. 615, notes 2-5 inclusive. *Allen v. Hammond*, 11 Pet. (U. S.) 63. Note 1 also contains some other cases in point.

<sup>3</sup> See *ante*, p. 616, notes 1-5 *et seq.* *Kowalke v. The Milwaukee, etc. Ry.*, 103 Wis. 472, contains a very good discussion of this point, *obiter*.

<sup>4</sup> *Dambmann v. Schulting*, 75 N. Y. 55, 61; *Graham v. Meyer*, 99 N. Y. 611; *Burgess v. Chapin*, 5 R. I. 225, 228; *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178, 195; *Cleaveland v. Richardson*, 132 U. S. 318, 329.



the existence of some fact a condition of the agreement, a mutual mistake as to that fact is no ground for relief.

Of course what was said in the last paragraph applies only to cases of mistake. If there be fraud, a different rule applies. It is well settled that equity will relieve, where there is fraud, even where the fraud touches only matters of inducement. Indeed, it is not necessary that the fraud be the sole inducement to enter into the agreement.<sup>1</sup> Thus, where A is induced to contract by several material representations made by B, some true and some false, the fact that the false representations are not the sole inducement does not constitute a defense.<sup>1</sup> In the same way, if B, *at or before* the making of the agreement, knows that A is contracting under a mistake as to some matter of inducement, he cannot insist on the bargain.<sup>2</sup> It is true that, in this latter case, B does not affirmatively cause the mistake. So far, at least, his conduct is less dishonest than where B's own misrepresentations are the cause of A's misconception. For this reason, an action of deceit would probably not lie against him. But, when B stands by, knowing of the mistake, and permits A to contract, he is still guilty of unconscionable conduct. He grasps the contract rights with unclean hands. It is no longer open to him to urge that the error is only extrinsic. He is seeking to profit by his own wrong, and this the Chancellor will not permit. On the other hand, knowledge of the mistake must be actually or legally brought home to B in order to preclude him from insisting on the extrinsic character of the mistake as a defense. Thus negligence in discovering the facts cannot be substituted for knowledge of them. Even a surety, who makes no inquiry, cannot object that, if the creditor had used ordinary care in investigating the facts, the fatal fact would have been discovered.<sup>3</sup> It is the consciousness of the error at, or prior to, the making of the contract, which carries the case across the line from

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<sup>1</sup> *Matthews v. Bliss*, 22 Pick. (Mass.) 48; *Safford v. Grout*, 120 Mass. 20; *Sioux Nat. Bank v. Norfolk*, 56 Fed. 139; *Tooker v. Alston*, 159 Fed. 599; *Edgington v. Fitzmaurice*, 29 Ch. D. 459. And see also 20 Cyc. 41, notes 63 to 65.

<sup>2</sup> *Gun v. McCarthy*, L. R. Ir. 13 Ch. D. 304; *Harran v. Foley*, 62 Wis. 584; *Scott v. Coulson*, (1903), 2 Ch. 249; *Haviland v. Willets*, 141 N. Y. 35; *Clark v. Clark*, 55 N. J. Eq. 814; *McCormick v. Miller*, 102 Ill. 208.

<sup>3</sup> *Tapley v. Martin*, 116 Mass. 275; *Bowne v. Mt. Holly Bank*, 45 N. J. L. 360; *Wayne v. Commercial Bank*, 52 Pa. St. 343; *Bennett v. Bldg. Assoc.*, 57 Tex. 72; *Frelinghuysen v. Baldwin*, 16 Fed. 452; see also *Brillion Lumber Co. v. Barnard*, 131 Wis. 284, 295.

mistake into the realm of *f. aud.* So long, then, as B cannot be charged either actually or constructively with notice of the mistake, at or prior to the making of the bargain, there can be no relief unless the error be intrinsic and mutual.

As we have seen, there should be no rescission, unless the error be intrinsic. But this necessarily involves the requirement that the mistake be mutual — or else known to the other party at or prior to the making of the contract. An intrinsic mistake is a mistake "as to one of the things actually contracted about."<sup>1</sup> But there can be no contract without a meeting of minds. If, then, the minds of the parties meet upon the subject matter and terms of the bargain, an error by one party only must of necessity be extrinsic. Of course an error by one party only may prevent the making of the bargain, since it may prevent the required meeting of minds. The meeting of minds may be verbal, but not actual. Thus, in *Raffles v. Wichelous*,<sup>2</sup> the minds of the parties met verbally on the agreement to buy and sell certain cotton "ex Peerless" from Bombay. There was no uncertainty as to the wording of the agreement. But there was no contract because there were two ships called the Peerless, each Peerless sailed from Bombay, and each party had in mind a different vessel. In such a case, there can be no *rescission*, since there is no bargain to rescind. Of course, where the equities require it, there may be *cancellation*; that is to say, a destruction of the writing. Doubtless this is the meaning of the statement so often found in the cases, that an error by one party only may be ground for rescission.<sup>3</sup> Usually this statement occurs *obiter*, and the court has not in mind the distinction between cancellation and rescission, that is to say, the distinction between destroying a bargain on which the parties actually agreed, and destroying a writing which appears to define a bargain which never in truth existed. At any rate, when the case has actually arisen, the courts have almost uniformly refused to rescind a bargain on which the parties had actually agreed, for an error by one party only,<sup>4</sup>

<sup>1</sup> Dodge, J., in *Kowalke v. The Milwaukee, etc. Ry.*, 103 Wis. 472, 477. See also *ante*, p. 613 *et seq.*, where the nature of intrinsic error is fully discussed.

<sup>2</sup> 2 Hurl. & Co. t. 906.

<sup>3</sup> See *Moffett, etc. Co. v. Rochester*, 178 U. S. 373; *Bibber v. Carville*, 101 Me. 59. I have found but one case where the minds of the parties met and relief was actually given for an error by one party only, — *Board of School Commrs. v. Bender*, 36 Ind. App. 164. It seems hard to reconcile this with *Lucas v. Owens*, 113 Ind. 521.

<sup>4</sup> *Bibber v. Carville*, 101 Me. 59 (but notice that the decision is put partly on the ground of plaintiff's negligence), and cases cited *ante*, p. 612, note 1.



where such error was unknown to the other party. Two of the cases, *Steinmeyer v. Schroepel*<sup>1</sup> and *Grant Marble Co. v. Abbot*,<sup>2</sup> have been stated *supra* in the text. Moreover, these cases are in accord with the numerous authorities which hold that a surety who is induced to enter into the contract of suretyship by the fraud of the principal debtor has no defence against the creditor, unless the creditor had notice of the fraud at, or prior to, the making of the contract.<sup>3</sup> If even a surety, that favorite of the Chancellor, cannot avoid his contract where his error is due to the fraud of a third party, it seems clear that one who is responsible for his own mistake should have no relief. He must verify his reasons for contracting before he contracts. After the contract is made, it is too late for him to say that his reasons for making it were bad.

We have now considered mistake with reference to both reformation and rescission. It only remains to call attention to two general limitations on mistake as a ground for equitable relief. In the first place, the mistake must relate to some past or present fact.<sup>4</sup> The Chancellor does not give relief because the unexpected happened or the expected failed to occur. The same rule is applied in cases of fraud. A representation that something will take place in the future is no ground for relief, even though the representation fails to materialize. Future probabilities must always be a matter of uncertainty, although the uncertainty may be greater or less, according to circumstances. As to the future, then, each party must take his chance.

<sup>1</sup> 226 Ill. 9.

<sup>2</sup> 124 N. W. 264 (Wis.)

<sup>3</sup> *Davis, etc. Co. v. Buckles*, 89 Ill. 237; *Lepper v. Nuttman*, 35 Ind. 384; *Jones v. Swift*, 94 Ind. 516; *Bank of Monroe v. Anderson*, 65 Ia. 72 (*semble*); *Martin v. Campbell*, 120 Mass. 126; *Radovsky v. Fall River Savings Bank*, 196 Mass. 557; *McWilliams v. Mason*, 31 N. Y. 294; *Casoni v. Jerome*, 58 N. Y. 315; *Page v. Krekey*, 137 N. Y. 307 (*semble*); *Howe, etc. Co. v. Farrington*, 82 N. Y. 121; *Kulp v. Brant*, 162 Pa. St. 222; and see *Fairbanks v. Snow*, 145 Mass. 153 (*duress*); *Brandt, Suretyship*, §§ 456, 457. The same rule applies to ordinary contracts. *Law v. Grant*, 37 Wis. 548.

The question as to how far notice to an agent is notice to the principal is beyond the scope of this article. But in this connection *Barker v. Pullman Palace Car Co.*, 124 Fed. 555, affirmed C. C. A. 134 Fed. 70, will be of interest. In that case it was held that, where two agents had power to negotiate only, but the principals reserved the power to conclude the agreement, an error mutual as to the agents was *not* mutual as to the principals, and hence such mutual error of the negotiating agents was not ground for reformation.

<sup>4</sup> *Parke v. Boston*, 175 Mass. 464; *Southwick v. Memphis, etc. Bank*, 84 N. Y. 420; *Kowalke v. The Milwaukee, etc. Co.*, 103 Wis. 472, 477 (*semble*). See also 20 Am. & Eng. Encyc. 813. Cf. *Miles v. Stevens*, 3 Pa. St. 21.

Broadly speaking, also, the Chancellor only helps those who help themselves. Courts of equity do not sit for the purpose of relieving the negligent from the consequences of their own carelessness. As we have already seen, the mistake is the work of the very party who pleads it as a reason for relief. It is going a good way to relieve a party from his contract, because of something which he himself has done. Certainly it seems reasonable for the Chancellor to refuse his aid to one who might have protected himself by using ordinary care at the time of making the agreement. If at law A may be made to respond in damages to one whose injury is the proximate consequence of A's negligence, it seems inconsistent for equity to give A relief because his negligence has recoiled on his own head. At law, also, contributory negligence is a bar to relief.

In this instance equity has followed the law,<sup>1</sup> though with some qualifications and hesitations.<sup>2</sup> Further discussion of these qualifications is outside the scope of this article. Here it is enough to say that relief is frequently, but not invariably denied to a party whose error is a consequence of his own want of reasonable care.

In summary, then, we have the following propositions:

1. To be a ground for relief the mistake must relate to a present existing fact and must not be due to a want of ordinary care on the part of the plaintiff.
2. If the plaintiff seek reformation of a writing intended to set forth a transaction based on valuable consideration, the plaintiff must establish a prior bargain upon which the parties agreed, and that by mutual mistake, or mistake on the part of the plaintiff, and knowledge thereof on the part of the defendant, that writing fails to express the prior bargain.
3. If the plaintiff seek reformation of a writing intended to set forth a gift, he must show that by mistake in reducing the terms of the gift to writing, the writing fails to express the donor's intention; but in such a case the donor is the only party who may obtain this relief, since equity will not interfere to increase the gift in favor of the donee who is a mere volunteer.

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<sup>1</sup> *Placer County Bank v. Freeman*, 126 Cal. 90; *Bibber v. Carville*, 101 Me. 59; *Glenn v. Statler*, 42 Ia. 107; *Brown v. Fagan*, 71 Mo. 563; *Johnston v. Patterson*, 114 Pa. St. 398; *Pearce v. Suggs & Pettit*, 85 Tenn. 724; *Anderson v. Warne*, 71 Ill. 20; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392; *Kaiser v. Nummendor*, 120 Wis. 234; *Grant Marble Co. v. Abbot*, 124 N. W. 264 (Wis.); *Grymes v. Sanders*, 93 U. S. 55; *Shappirio v. Goldberg*, 192 U. S. 232, 241; 2 Story, Eq., 13 ed., p. 225; 16 Cyc. 69.

<sup>2</sup> 6 Pomeroy, Eq. Jur. § 680, note 19; 2 Pom. Eq. Jur. § 856.



4. If the plaintiff seek rescission, he must show that the parties entered into the agreement under a mutual mistake as to some matter actually contracted about; or else that the defendant became cognizant of the plaintiff's mistake at, or prior to, the making of the agreement.

It may be noted, then, that the general rule is that, whether the relief sought be rescission or reformation, the plaintiff must show either a mutual mistake, or else a mistake on his own part, coupled with knowledge thereof on the part of the defendant. The exception to this rule is the case where equity reforms a writing at the suit of a donor as against a donee who is a mere volunteer.

*Edwin H. Abbot, Jr.*

CAMBRIDGE, MASS.

# HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER.

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QUASI-CONTRACTUAL RELIEF UNDER EXECUTORY ULTRA VIRES CONTRACTS. — In no jurisdiction in this country will a fully executed transaction be disturbed on the ground of *ultra vires*.<sup>1</sup> The courts are likewise unanimous in refusing relief on an *ultra vires* contract which remains wholly executory.<sup>2</sup> But where the contract has been fully performed on one side and benefits have been received on the other, there is a square division of authority.<sup>3</sup> Many jurisdictions follow New York in allowing suit on the contract.<sup>4</sup> Others, adopting the federal rule, refuse any recovery upon the contract, the ground of objection being "not merely that the corporation ought not to have made it, but that it could not make it."<sup>5</sup> Yet even in such jurisdictions a plaintiff who has performed in full, or even in part, is not wholly without relief. He may bring a bill in equity for rescission and restoration *in statu quo*.<sup>6</sup> And it is also settled that he may, in an action

<sup>1</sup> National Bank v. Matthews, 98 U. S. 621; Parish v. Wheeler, 22 N. Y. 494, 508. See 18 HARV. L. REV. 461.

<sup>2</sup> Safety, etc. Cable Co. v. Mayor, etc. of Baltimore, 74 Fed. 363; Nassau Bank v. Jones, 95 N. Y. 115. See 18 HARV. L. REV. 461. *Contra*, Harris v. Independence Gas Co., 76 Kans. 750.

<sup>3</sup> The courts have made no distinction between the case where the outsider sues the corporation and the case where the corporation is the party plaintiff against the outsider.

<sup>4</sup> Bath Gas Light Co. v. Claffy, 151 N. Y. 24; Camden & Atlantic R. R. Co. v. May's Landing, etc. R. R. Co., 48 N. J. L. 530.

<sup>5</sup> Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24; Marble Co. v. Harvey, 92 Tenn. 115. See 19 HARV. L. REV. 608.

<sup>6</sup> New Castle Northern Ry. Co. v. Simpson, 21 Fed. 533; Central Branch U. P. R. R. Co. v. W. U. Telegraph Co., 1 McCrary (U. S.) 551.



of *quantum meruit*, obtain the return of any property received, or its value. The courts expressly treat this suit as a disaffirmance of the transaction; no remedy involving recourse to the *ultra vires* contract is allowed.<sup>8</sup> Thus no relief is obtainable against a defendant who has received nothing of value.<sup>9</sup> Nor can damages caused by the non-fulfillment of the contract be recovered.<sup>10</sup>

On the other hand, a doctrine has been announced, apparently inconsistent with the allowance of any form of relief on an executory *ultra vires* contract. In a case where the plaintiff had fully performed and the defendant had not repudiated the transaction, the Supreme Court held that since the parties were *in pari delicto*, equity would not aid in the rescission of the contract.<sup>11</sup> This seems squarely contradictory to former statements by the same court that it is the legal duty of the parties to rescind.<sup>12</sup> Moreover, it seems irreconcilable with the granting of quasi-contractual relief in disaffirmance of the contract. As a general rule, where an executory contract is merely *malum prohibitum*, the fact that the parties are *in pari delicto* will not prevent recovery in *quantum meruit* for money or property transferred.<sup>13</sup> The granting of quasi-contractual relief in the case of executory *ultra vires* contracts is therefore in accordance with the ordinary principles of the law of contracts. And the refusal of relief on the ground that the parties are *in pari delicto* is thus not only in conflict with the established federal theory of recovery in *quantum meruit*, but is wholly unsupported by authority. The doctrine has not been followed, even by the federal courts.<sup>14</sup>

In a recent case A was indebted to the B corporation to the extent of \$10,000. At the request of B, the C corporation made a loan of \$12,000 to A, the repayment of which was guaranteed by B. In accordance with a previous agreement, A paid over \$10,000 of this sum to B. A defaulted. On C's suing B upon the latter's guaranty, B pleaded *ultra vires*. The court allowed C to recover \$10,000 in *quantum meruit*. *Citizens' Central National Bank v. Appleton*, 30 Sup. Ct. 364. Such a guaranty is executory: it cannot, like a conveyance or a mortgage,<sup>15</sup> be regarded as an

<sup>7</sup> *Logan County Nat'l Bank v. Townsend*, 139 U. S. 67, 74; *Aldrich v. Chemical National Bank*, 176 U. S. 618; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598. See 19 HARV. L. REV. 608. *Contra*, *Grand Lodge of Ala. v. Waddill*, 36 Ala. 313.

<sup>8</sup> *Central Transportation Co. v. Pullman's Palace Car Co.*, *supra*; *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138.

<sup>9</sup> *Penn. R. R. Co. v. St. Louis, etc. R. R. Co.*, 118 U. S. 290; *Franklin Co. v. Lewiston Savings Bank*, 68 Me. 43.

<sup>10</sup> *Pullman's Palace Car Co. v. Central Transportation Co.*, *supra*; *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146.

<sup>11</sup> *St. Louis, etc. R. R. Co. v. Terre Haute, etc. R. R. Co.*, 145 U. S. 393. This case cannot be explained as being an executed transaction since a lease has been uniformly held to be executory in character. *Thomas v. Railroad Co.*, 101 U. S. 71.

<sup>12</sup> *Thomas v. Railroad Co.*, *supra*; *Penn. R. R. Co. v. St. Louis, etc. R. R. Co.*, *supra*. It is also inconsistent with the refusal at the instance of the defendant to allow the plaintiff himself to retake the property transferred as in the case of *American Union Teleg. Co. v. U. P. Ry. Co.*, 1 McCrary (U. S.) 188.

<sup>13</sup> *Spring Co. v. Knowlton*, 103 U. S. 49; *Block v. Darling*, 140 U. S. 234, 239. See POLLOCK, CONTRACTS, 3 Am. ed., 502, 503.

<sup>14</sup> *McCutcheon v. Merz Capsule Co.*, 37 U. S. App. 586; *Pullman's Palace Car Co. v. Central Transportation Co.*, *supra*. *Contra*, *Olcott v. Internat'l & Gr. N. Ry. Co.*, 28 S. W. 728 (Tex. Civ. App.).

<sup>15</sup> *Fritts v. Palmer*, 132 U. S. 282 (conveyance); *National Bank v. Matthews*, *supra* (mortgage).

executed transaction. Accordingly, the jurisdictions adopting the federal rule restrict the parties, on an *ultra vires* guaranty, to quasi-contractual relief.<sup>16</sup> In the present case justice between the parties is accomplished, since the amount of recovery in *quantum meruit* is nearly equal to that on the contract. But in many instances quasi-contractual relief is grossly inadequate.<sup>17</sup> Such cases emphasize the obvious fairness of the New York rule.

COMPULSORY INCORPORATION OF BANKS AND THE FOURTEENTH AMENDMENT. — It is settled that the "liberty" protected by the Fourteenth Amendment includes liberty to choose and pursue a business or occupation.<sup>1</sup> But it was earlier decided that the restriction placed by that Amendment upon the general legislative power reserved by the states does not extend to prohibit legislation passed by virtue of the police power.<sup>2</sup> Within the limits of this power liberty may be restricted.

Interesting in this connection is a recent state decision holding constitutional a state statute which requires all persons engaged in banking to incorporate within three months. There were existing statutes regulating incorporated banks, under which at least three individuals had to unite to form a corporation. *Weed v. Bergh*, 124 N. W. 664 (Wis.). The business of banking is not a franchise to be granted by the state on what conditions it will, but an occupation lawful at common law.<sup>3</sup> It is equally well recognized, however, that it is a business which the state may regulate,<sup>4</sup> provided that such regulation be made in discharge of some recognized governmental function.<sup>5</sup> Undoubtedly banking regulations to protect the depositors from fraud are unimpeachable.<sup>6</sup> To this end were directed some of the existing statutes in the principal case; but some went further in seeking merely to protect the depositor from the insolvency of the bank.<sup>7</sup> Read in the light of these existing statutes, the apparent intent of the statute in question was to make all engaged in the business of banking subject to these regulations. The fact that banks deal in their own credit, the widespread evil results of a bank failure, and the inability of the depositors to guard against loss, are considerations sufficient to show that regulation to insure the financial stability of banks is a legitimate governmental function.<sup>8</sup>

Not only must the end of the legislation be legitimate, but the means adopted by it must bear some intimate relation to that end. There cannot, for instance, be prohibition of a lawful business under the guise of regula-

<sup>16</sup> *Humboldt Mining Co. v. American Mfg., etc. Co.*, 62 Fed. 356; *Norton v. Derby National Bank*, 61 N. H. 589. See *Penn. R. R. Co. v. St. Louis, etc. R. R. Co.*, *supra*.

<sup>17</sup> *Pullman's Palace Car Co. v. Central Transportation Co.*, *supra*. Cf. *Bissel v. Michigan Southern, etc. R. R. Co.*, 22 N. Y. 258. See 14 HARV. L. REV. 339.

<sup>1</sup> *Allgeyer v. Louisiana*, 165 U. S. 578. For an argument that the correct meaning is freedom from physical restraint see 4 HARV. L. REV. 365.

<sup>2</sup> *Butchers' Union, etc. Co. v. Crescent City, etc. Co.*, 111 U. S. 746.

<sup>3</sup> *Nance v. Hemphill*, 1 Ala. 551.

<sup>4</sup> *Meadowcroft v. People*, 163 Ill. 56.

<sup>5</sup> Cf. *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 493.

<sup>6</sup> *Baker v. State*, 54 Wis. 368; *Meadowcroft v. People*, *supra*.

<sup>7</sup> *SANBORN'S STAT. SUPP.* (Wis., 1906), §§ 2024-6 to 2024-55.

<sup>8</sup> *Blaker v. Hood*, 53 Kan. 499; *State v. Richcreek*, 167 Ind. 217. See FREUND, *POLICE POWER*, § 400. Cf. *Brady v. Mattern*, 125 Ia. 158.



tion.<sup>9</sup> On the other hand, any regulation is in effect prohibition of all ways of doing business except those in accordance with the regulations. But if the regulation is proper, no one has a right to do business except in accordance therewith.<sup>10</sup>

To require those without the purview of existing laws to come within it is obviously not the only way to control the outsiders; for the very circumstances which would validate compulsory incorporation authorize the regulation of partnerships and individuals, by extending the scope of the existing laws<sup>11</sup> to include them. Moreover, compulsory incorporation under the existing laws is open to the serious objection that it prohibits banking by individuals or by firms of two. The principal case, however, points out two dangers of private banking, to eliminate which would require more than an extension of the existing regulations: the subjection of the deposits to claims of the individual banker's outside creditors, and the possible interruption of business on his death. Doubtless these dangers could be prevented by some form of additional regulation which would not have the effect of prohibiting private banking. But in view of the ease with which an individual can obtain two associates for the purpose of incorporation, while himself retaining full control of the business, the restriction would seem to be theoretical rather than actual. It is therefore submitted that the principal case is correct<sup>12</sup> in not regarding compulsory incorporation as such an unreasonable means of regulation as to be unconstitutional.<sup>13</sup>

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LICENSE AND WAIVER OF BREACH OF CONDITION IN LEASES. — A landlord may release his right of entry for a breach of condition by assent to the breach either prior or subsequent thereto; *i. e.*, by license or waiver.<sup>1</sup> The effect of this assent on the right to enter for subsequent breaches has long been a mooted question. Purporting to follow the cases which held that a condition could not be apportioned,<sup>2</sup> *Dunpor's Case*<sup>3</sup> decided in 1603 that a license to assign "to any person or persons, *quibuscunque*," destroyed a condition against assignment, so that an assignee could assign without license. Although this decision might well have been confined to licenses to assign to "any person," it was not so restricted; and the next case to consider the question held that a condition against assignment was

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<sup>9</sup> *Smyth v. Ames*, 169 U. S. 466.

<sup>10</sup> *Dent v. West Virginia*, 129 U. S. 114. Thus it has been held unobjectionable to require all bankers to submit to inspection (*Blaker v. Hood, supra*); to make it criminal for a banker to receive a deposit after knowledge of insolvency (*Meadowcroft v. People, supra*); to require a minimum amount of capital to be invested in certain ways; to restrict the use of the word "bank" to those who comply with certain conditions (*State v. Richcreek, supra*).

<sup>11</sup> See FREUND, POLICE POWER, § 364.

<sup>12</sup> *State ex rel. Goodsell v. Woodmansee*, 1 N. D. 246, *acc.* *Contra, State v. Scougal*, 3 S. D. 55. *Cf. Commonwealth v. Vrooman*, 164 Pa. St. 306; *Commonwealth v. Carter*, 132 Mass. 12.

<sup>13</sup> But *cf.* 23 HARV. L. REV. 292.

<sup>1</sup> *Weisbrod v. Dembosky*, 25 N. Y. Misc. 485; *Goodright d. Walter v. Davids*, Cowp. 803. See *Pennant's Case*, 3 Co. 64 *a*.

<sup>2</sup> *Leeds v. Crompton*, 1 Rol. Abr. 472, Pl. 7; *Winter's Case*, Dy. 308 b; *Anon.*, Dy. 152, pl. 7. See *Wright v. Burroughes*, 3 C. B. 685, 699.

<sup>3</sup> 4 Co. 119 b; s. c. Cro. Eliz. 815.

destroyed by one license to assign to a definite person, followed by an assignment to that person.<sup>4</sup> These decisions appear to have been acquiesced in as settling the English law with respect to the effect of a license to assign,<sup>5</sup> but the harshness of the rule led to its abrogation by statute in 1859.<sup>6</sup> In the United States it is difficult to state the effect of a license.<sup>7</sup> There seem to be no clear decisions;<sup>8</sup> but there are many *dicta* expressly recognizing *Dumppor's Case* as an authority for the doctrine that one license to assign destroys a condition against assignment.<sup>9</sup> This doctrine is probably the American law. There seems, however, no ground for extending it to conditions against other acts,<sup>10</sup> nor to covenants,<sup>11</sup> though there are statements in some of the treatises and cases to the contrary.<sup>12</sup>

The law as to the effect of waiver is in a more satisfactory state. If a lessor by his conduct subsequent to the breach, and with notice thereof, recognizes the continuance of the tenancy, he is barred from entering for that breach.<sup>13</sup> This is probably on the basis of a loose estoppel. But a tolerance of past breaches is not a license of future ones, and therefore does not destroy the condition.<sup>14</sup> Such is the holding of a recent case. *Beckenbach v. Harlow*, 31 Oh. C. C. 496 (Nov., 1909). This doctrine is applied to conditions against underletting,<sup>15</sup> and against objectionable uses of the premises,<sup>16</sup> etc.; *i. e.*, conditions susceptible of more than one breach. A condition against assignment would appear equally subject to several breaches by successive assignments. Statements are found in the cases, however, that a waiver of an assignment may have the effect of a license, and destroy the condition altogether.<sup>17</sup> There seems to be no valid distinction between conditions capable of several breaches by one tenant, and those susceptible only of distinct breaches by successive tenants.<sup>18</sup> To make such a distinction would force a landlord, for fear of losing his right to object to subsequent assignments, to enter forthwith upon finding

<sup>4</sup> *Per* Lord Eldon in *Brummel v. Macpherson*, 14 Ves. 173. It is worthy of note that in *Anon.*, Dy. 152, pl. 7, cited as an authority by Lord Eldon for the position that an assignee by permission is not bound by the condition, the majority of the court went the other way.

<sup>5</sup> See 3 BYTHEWOOD, CONVEYANCING, 3 ed., 685, 686; *Doe d. Boscawen v. Bliss*, 4 Taunt. 735.

<sup>6</sup> 22 & 23 Vict., c. 35, §§ 1, 2 (Lord St. Leonard's Act).

<sup>7</sup> See 7 AMER. L. REV. 616; 1 WASHBURN, REAL PROPERTY, § 649; 1 TIFFANY, REAL PROPERTY, 176; 1 SMITH'S LEADING CASES, 9 Amer. ed., 137.

<sup>8</sup> See citations in note 7, *supra*; *Pennock v. Lyons*, 118 Mass. 92; *Chipman v. Emeric*, 5 Cal. 49; *Kew v. Trainor*, 150 Ill. 150; *North, etc. Co. v. Le Grand Co.*, 95 Ill. App. 435, 464.

<sup>9</sup> *Siefke v. Koch*, 31 How. Pr. (N. Y.) 383; *Wertheimer v. Hosmer*, 83 Mich. 56, 61; *Gazlay v. Williams*, 210 U. S. 41; s. c. below, 147 Fed. 678, 682. But see *North, etc. Co. v. Le Grand Co.*, *supra*.

<sup>10</sup> See 7 AMER. L. REV. 262, 633; 1 SMITH'S LEADING CASES, 11 Eng. ed., 45; *German-American Savings Bank v. Gollmer*, 102 Pac. 932 (Cal.).

<sup>11</sup> But see *Reid v. John F. Wiessner Brewing Co.*, 88 Md. 234. *Contra*, *Dakin v. Williams*, 17 Wend. (N. Y.) 447. And see 12 HARV. L. REV. 272.

<sup>12</sup> See, *e. g.*, 1 TAYLOR, LANDLORD AND TENANT, § 286; GOODWIN, REAL PROPERTY, 84.

<sup>13</sup> *Arnsby v. Woodward*, 6 B. & C. 519.

<sup>14</sup> *Doe d. Boscawen v. Bliss*, 4 Taunt. 735; *Jones v. Durrer*, 96 Cal. 95.

<sup>15</sup> *Doe d. Boscawen v. Bliss*, *supra*.

<sup>16</sup> *Farwell v. Easton*, 63 Mo. 446; *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376.

<sup>17</sup> *Heeter v. Eckstein*, 50 How. Pr. (N. Y.) 445; *Lloyd v. Crispe*, 5 Taunt. 249, 257.

<sup>18</sup> But see 1 SMITH'S LEADING CASES, 11 Eng. ed., 45; *German-American Savings Bank v. Gollmer*, 102 Pac. 932 (Cal.).



an assignee in possession, though the latter might be a very desirable tenant. Such a result has nothing to commend it.

It has been held that the destructive effect upon a condition of a license to assign may be nullified by the insertion in the license of a proviso that such license shall not authorize further assignments without the landlord's assent.<sup>19</sup> This expedient, if recognized, deprives Lord Coke's doctrine of much of its sting. It would seem that such a proviso should be equally efficacious if inserted in the original lease; as, by a statement that "no consent to any act by license or waiver shall be deemed a consent to any subsequent act."

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MARKET VALUE AS A MEASURE OF COMPENSATION. — The term "market value" is used by the courts in three distinct senses: to denote (1) current price;<sup>1</sup> (2) cash value;<sup>2</sup> (3) the measure of recovery.<sup>3</sup> In this last sense, the term obviously means nothing. By cash value is meant the cash sum for which the property in question could probably be sold by the owner, making reasonable efforts, and taking reasonable time to effect a sale. It is sometimes expressed as the price the property "would bring at a fair public sale, when one party wanted to sell and the other to buy."<sup>2</sup> It would seem less confusing to confine the term "market value" to the current price in the vicinity at the time the property is to be valued. It is generally so confined when chattels are the subject of valuation.<sup>4</sup>

But assuming that there is no current price, the determination of value becomes a complicated question. The law as to chattels is fairly definite to the effect that the cost of reproduction, or the original cost with deductions for depreciation, where practicable, shall govern.<sup>5</sup> Strictly there can be no current price on a tract of land, because there are no two tracts exactly alike. Consequently, in the majority of condemnation proceedings courts are driven to determine market value in the sense of cash value. The test of cash value is the bid of a reasonable willing buyer who has in mind certain elements of valuation, such as prices paid at sales of similar property,<sup>6</sup> any use to which the property is reasonably adapted,<sup>7</sup> original

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<sup>19</sup> *Kew v. Trainor*, 150 Ill. 150; *Springer v. Chicago, etc. Co.*, 202 Ill. 17. See *Wertheimer v. Hosmer*, 83 Mich. 56. But see 3 BYTHEWOOD, CONVEYANCING, 3 ed., 685, 691; *Mason v. Corder*, 7 Taunt. 9, 11 n.

<sup>1</sup> See *Dana v. Fiedler*, 12 N. Y. 40; *Cliquot's Champagne*, 3 Wall. (U. S.) 114.

<sup>2</sup> See *Lawrence v. Boston*, 119 Mass. 126.

<sup>3</sup> See *Reed v. O. & M. Ry. Co.*, 126 Ill. 48.

<sup>4</sup> See cases cited in note 5, *post*.

<sup>5</sup> *Mather v. American Express Co.*, 138 Mass. 55 (plans of a house); *Starkey v. Kelly*, 50 N. Y. 677 (household furniture). See *Simpson v. N. Y., N. H. & H. R. R.*, 38 N. Y. S. 341 (wearing apparel); *Heald v. McGowan*, 15 Daly (N. Y.) 233, affirmed, 117 N. Y. 643 (electrotypes plates); *Wamsley v. Atlas Steamship Co.*, 50 N. Y. App. Div. 199, reversed on another ground, 168 N. Y. 533 (photograph negatives). Conversely, if there is a current price, evidence as to cost, etc., is inadmissible. *Althouse v. Alvord*, 28 Wis. 577.

<sup>6</sup> *Denham v. Dunbar*, 103 Mass. 365; *Patch v. Boston*, 146 Mass. 52. The similarity between the properties must be affirmatively shown. *Cummins v. D. M. & St. L. Ry. Co.*, 63 Ia. 397. In Pennsylvania evidence of sales of similar property is inadmissible. *Railroad Co. v. Patterson*, 107 Pa. St. 461. See also *Stinson v. C.*, St. P. & M. Ry., 27 Minn. 284.

<sup>7</sup> *Boom Co. v. Patterson*, 98 U. S. 403. A recent case strikingly illustrates that an

cost,<sup>8</sup> cost of reproduction of improvements, depreciation,<sup>9</sup> "going concern" value,<sup>9</sup> and the like. Where there are buildings on the land, an important element to be considered is the cost of reproduction. As to when such evidence is admissible, the law is in some confusion. Where a city is condemning a water plant, reproductive cost is usually the controlling, if not the only, basis of valuation.<sup>10</sup> But the New York rule has been that it is inadmissible in evidence,<sup>11</sup> except, possibly, in the cross-examination of an expert on real estate values. This rule, however, seems unnecessary; for the jury is as competent as the expert to determine whether the cost of reproduction would influence the bid of the imaginary reasonable buyer. And in a recent New York eminent domain proceeding, direct evidence of the reproductive cost of tenements on the premises was held admissible. *Matter of Blackwell's Island Bridge*, 91 N. E. 278 (N. Y.). The court adopted as the sole test, whether the structures were so adapted to the land as to increase its value proportionately to the cost of the structures. This is but another way of stating the imaginary reasonable buyer test.

It may be supposed that an eccentric millionaire has built an expensive country establishment distant from any fashionable resort or transportation, so that no reasonable buyer would conceivably pay anything like the amount expended. Surely a railroad condemning the property could not limit compensation to the enhanced value of the land in the eyes of a business man; it is submitted that reproductive cost should here also be evidence of value. Although the exact problem seems not to have arisen,<sup>12</sup> it causes one to doubt the infallibility of the reasonable buyer test.

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IMMUNITY FROM JUDICIAL CONTROL OF EXECUTIVE OFFICERS AND MEMBERS OF THE LEGISLATURE. — A suit against an executive officer may be really a suit against the state,<sup>1</sup> and, if so, may be maintained only with the state's consent. Equally fundamental is the principle that if the act sought to be enforced involves the determination of a political question, the courts have no jurisdiction of the subject matter of that question.<sup>2</sup>

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improbable use will not be considered. A owned an area of land over which B had an easement of light, air, and access. The city condemned it for street purposes. A and B joined in a suit demanding the full current value of the land. B's easement was not materially damaged. The amount demanded involved the valuation for use with the easement removed; *i. e.*, for building purposes. The prospect of B's releasing the easement was improbable. *Held*, that the plaintiffs are not entitled to the compensation demanded. *Boston Chamber of Commerce v. Boston*, U. S. Sup. Ct., April 4, 1910.

<sup>8</sup> *Brown v. Calumet River Ry. Co.*, 125 Ill. 600; *St. L. & S. F. Ry. v. Smith*, 42 Ark. 265. Original cost is of varying weight as evidence of cash value: unless the purchase was recent, the evidence is inadmissible. *Lanquist v. Chicago*, 200 Ill. 69.

<sup>9</sup> See *Gloucester Water Co. v. Gloucester*, 179 Mass. 365.

<sup>10</sup> See *Kennebec Water District v. Waterville*, 97 Me. 185; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541; *Gloucester Water Co. v. Gloucester*, *supra*.

<sup>11</sup> *Matter of Simmons*, 130 N. Y. App. Div. 350, affirmed, 195 N. Y. 573.

<sup>12</sup> See *Wall v. Platt*, 169 Mass. 398.

<sup>1</sup> *Hagood v. Southern*, 117 U. S. 52.

<sup>2</sup> *Mississippi v. Johnson, President*, 4 Wall. (U. S.) 475; *Dennett, Petitioner*, 32 Me. 508. A political act is one committed by the sovereign to the final determination of a department other than the judicial department.



Where neither of these difficulties is involved an executive officer, other than the chief magistrate, is subject to judicial process. Cabinet ministers of England have, at the suit of the subject, been compelled to act by mandamus<sup>3</sup> and restrained by injunction.<sup>4</sup> In this country one court has held that the occasion and manner of performing any duty imposed by statute on a constitutional member of the executive is a political question to be decided by him.<sup>5</sup> But the general rule is that an executive officer as high in rank as the head of a department may be compelled by the courts to perform a ministerial act.<sup>6</sup>

If the chief executive officer is a king, as sovereign he is not subject to the courts' commands.<sup>7</sup> Though the President of the United States and the governors of the several states are not sovereigns, the difficulties in the courts taking jurisdiction of their acts and issuing process against them are many. It is universally admitted that no court can enforce its process by imprisonment of the chief executive's body.<sup>8</sup> And, as regards duties expressly imposed by constitution or statute on the chief executive as such, there is a more serious jurisdictional objection: from the tripartite division of powers in the federal and state constitutions, resulting in the impotence of the courts actually to control the President or governor, the meaning of the constitutions must be taken to be that as to such duties the decision of the chief executive is final.<sup>9</sup> Therefore, unless the constitution authorizes the giving of advisory opinions by the court, the chief magistrate's submission of the question to its determination should not alter the situation.<sup>10</sup> Another question is presented, however, when there is considered the liability of the chief executive during incumbency for breach of such duties as are imposed by law upon all citizens. The establishment of a court of impeachment doubtless gives it, during incumbency, exclusive jurisdiction of any crime committed by him. Moreover it is conceded that if the President or governor is served with a subpoena, it is for him to determine the public expediency of his appearing in court or producing the desired documents.<sup>11</sup> But it is submitted that the court loses no dig-

<sup>3</sup> *The King v. The Lords Commissioners of His Majesty's Treasury*, 5 N. & M. 589.

<sup>4</sup> *Ellis v. Earl Grey*, 6 Sim. 214.

<sup>5</sup> *State ex rel. The County Treasurer of Millelacs County v. Dike*, 20 Minn. 363.

<sup>6</sup> *Kendall v. U. S.*, 12 Pet. (U. S.) 524; *Larcom v. Olin*, 160 Mass. 102; *People ex rel. Chatterton v. Secretary of State*, 58 Ill. 90.

<sup>7</sup> For centuries, the claims of subjects against the King of England have been, with the King's consent in each case, adjudicated upon by a petition of right addressed usually to the King in his High Court of Chancery. *Taylor v. Attorney General*, 8 Sim. 413. The procedure is now regulated by statute, 23 & 24 Vict. c. 34.

<sup>8</sup> See *People ex rel. Sutherland v. Governor*, 29 Mich. 320; *Mississippi v. Johnson, President*, *supra*.

<sup>9</sup> *Hawkins v. Governor*, 1 Ark. 570; *State ex rel. Low v. Towns, Governor*, 8 Ga. 360; *People ex rel. Sutherland v. Governor*, *supra*. A minority of states hold that the judicial power extends to commanding the governor to perform a ministerial act. *Harpending v. Haight*, 39 Cal. 189; *Cotten v. Ellis, Governor*, 7 Jones L. (N. C.) 545. On the theory that the court must determine whether the incumbent in fact of the office is legally the governor, *quo warranto* proceedings have been maintained. *Attorney General ex rel. Bashford v. Barstow*, 4 Wis. 567; *State ex rel. Thayer v. Boyd*, 31 Neb. 682.

<sup>10</sup> *State v. Stone*, 120 Mo. 428; *State v. Dike*, *supra*. *Contra*, *People ex rel. Stickney v. Palmer, Governor*, 64 Ill. 41.

<sup>11</sup> *U. S. v. Burr*, Fed. Cas. No. 14,692 a; *Thompson v. The German Valley Railroad Co.* 22 N. J. Eq. 111. Cf. *Beatson v. Skene*, 5 H. & N. 838. In all these cases the original process of subpoena issued, but the court refused to enforce its order.

nity in issuing process, if the possible disobedience of the executive is based upon a legal right. In a British colony, the inability to levy execution on the person of governor during incumbency has not prevented an adjudication on an individual's right against him.<sup>12</sup> And in this country there seems to be no reason why the law should be otherwise; for it does not follow from the constitutional division of powers that the chief magistrate is given the final determination of his private rights and duties.<sup>13</sup>

The legislative department must, of course, be given final determination of legislative questions.<sup>14</sup> Its members are expressly or impliedly privileged from arrest during session, except for treason, felony, or breach of the peace.<sup>15</sup> But their temporary immunity from bodily coercion should not prevent the courts from taking jurisdiction of their personal acts.<sup>16</sup> The performance even of special ministerial duties imposed upon members of state legislatures has been ordered by the court in mandamus proceedings.<sup>17</sup> And in a recent District of Columbia case the court took such jurisdiction over members of a committee of Congress. *Valley Paper Co. v. Smoot et al.*, 38 Wash. L. R. 170 (D. C., Sup. Ct., Feb. 28, 1910). Both the state and federal cases would seem, on principle, to be correct. For the fact that a constitution has conferred the legislative power on a body of men, does not prove that it has entrusted to them individually, or as members of a committee, the final determination of the facts and law involved in the performance of a ministerial act.

**FIRE INSURANCE ON PROPERTY USED IN AN ILLEGAL BUSINESS.** — A contract to indemnify a lawbreaker for loss which the law imposes as a consequence of his wrongdoing is clearly unenforceable.<sup>1</sup> Insurance against fine or forfeiture for selling liquor without a license would be such a contract, and must be distinguished from insurance against the accidental destruction by fire of property used in the business. It also seems clear that the law should not enforce a fire insurance policy containing a warranty that the property is used for an illegal purpose. But a mere statement in the policy that the property is so to be used may be construed as a permission of such use, rather than a warranty that it shall be so used.

Where the peril is not imposed by law and the contract does not require the illegal use, a more difficult question is presented. On the one hand, when the whole of the property insured is intended to be the immediate

<sup>12</sup> *Hill v. Bigge & Rundell*, 3 Moo. P. C. 465.

<sup>13</sup> See *Mauran v. Smith*, Governor, 8 R. I. 192; *State ex rel. Bisbee v. Drew*, Governor, 17 Fla. 67.

<sup>14</sup> *Ex parte Echols*, 39 Ala. 698.

<sup>15</sup> U. S. CONST., Art. I, sec 6; *In re Armstrong*, (1892) 1 Q. B. 327. See *State ex rel. Benton v. Elder*, 31 Neb. 169. In England this privilege has been held not to prevent imprisonment for a criminal contempt of court. *Wellesly's Case*, 2 Russ. & M. 639.

<sup>16</sup> This follows *a fortiori* from the decisions cited in notes 11, 12, and 17. Doubtless their own decision that their legislative duties require their presence elsewhere is a sufficient excuse for their non-appearance in court.

<sup>17</sup> *Attorney General v. Taggart*, 66 N. H. 362; *Ex parte Pickett*, 24 Ala. 91; *State ex rel. v. Elder*, *supra*. See *People ex rel. Broderick v. Morton*, 156 N. Y. 136.

<sup>1</sup> Insurance against capture of a ship on an illegal voyage is such a contract. *Potts v. Bell*, 8 T. R. 548.



subject of illegal transactions — for example, insurance on a stock of liquor to be sold without a license<sup>2</sup> — the contract is against public policy. It may be objected that this is punishing a crime without the usual safeguards of criminal trials, and that it confers a wholly undeserved benefit on the defendant. But to deny the right to enforce an insurance contract of this sort tends to deter the promotion of such kinds of business, while a contrary policy would indirectly encourage the very thing forbidden by the law. On the other hand, when the property is only remotely connected with the illegal transaction, the policy is enforceable.<sup>3</sup> The difference between these two classes of contracts is one merely of degree, and the more objectionable the transaction, the further its taint will extend to connected matters. Not unnaturally, therefore, the same state of facts may be regarded as falling on different sides of the line in different jurisdictions.<sup>4</sup> If the analogy of ordinary contract law were strictly followed, the result would be that even where only a small part of the property was to be the subject of illegal transactions, the entire contract of insurance would be held unenforceable.<sup>5</sup> Nevertheless, when the question arises, the courts will almost certainly enforce such a contract, at least as to the untainted portion. The policy of protecting the insured would to that extent probably outweigh the policy of indirectly discouraging the illicit traffic.

Permission to make an illegal use is an attempt by the underwriter to waive that form of illegality as a defense. But since illegality is a defense given for the protection not of the underwriter but of the public, illegal use, like the related defense of want of insurable interest,<sup>6</sup> cannot be waived, a recent Canadian case to the contrary notwithstanding. *Morin v. Anglo-Canadian Fire Ins. Co.*, 12 Western L. R. 387 (Alberta, Trial, Dec. 2, 1909). An attempted waiver makes only more certain the fact that the policy was really intended to protect an illegal business.

Many policies contain an express condition of avoidance in case the property insured is used for unlawful purposes. The violation of this condition at any time during the term of the policy prevents a recovery as to subsequent loss.<sup>7</sup> In the absence of an express condition, illegality affects the validity of an insurance policy *ab initio* if at all. Hence the fact that the property is actually used illegally is of no consequence, if the illegality was not contemplated at the time of contracting.<sup>8</sup> Conversely, if the illegality was contemplated at the time of contracting, there can be no recovery, though the illegal use was discontinued before the loss, or had nothing to do with the cause of the fire.<sup>9</sup>

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PROOF OF CONTINGENT CLAIMS AGAINST A BANKRUPT ESTATE. — To what extent, if at all, contingent claims may be proved against a bankrupt

<sup>2</sup> *Kelly v. Home Ins. Co.*, 97 Mass. 288.

<sup>3</sup> *Phenix Ins. Co. v. Clay*, 101 Ga. 331.

<sup>4</sup> Insurance on furniture in a bawdy house is held valid. *Conithan v. Royal Ins. Co.*, 91 Miss. 386. *Contra*, *Bruneau v. Laliberté*, Q. R. 19 C. S. 425.

<sup>5</sup> See WILLISTON'S, *WALD'S POLLOCK, CONTRACTS*, 483.

<sup>6</sup> *Agricultural Ins. Co. v. Montague*, 38 Mich. 548.

<sup>7</sup> *Kelly v. Worcester Mutual Fire Ins. Co.*, 97 Mass. 284.

<sup>8</sup> *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418; *Erb v. German-American Ins. Co.*, 98 Ia. 606.

<sup>9</sup> *Lawrence v. National Fire Ins. Co.*, 127 Mass. 557 n.

estate, has been a very troublesome question, and has received a great variety of judicial answers. The early English statutes made express provision for the proof of fixed claims only, so that under them contingent claims were held not provable.<sup>1</sup> An act passed in 1825<sup>2</sup> allowed contingent debts to be proved. But by narrow construction the courts took a distinction between contingent "debts" and contingent "liabilities"; the latter were held not to be within the statute, on the ground that no debt would arise until the amount owed became fixed, which could be only upon the happening of a contingency.<sup>3</sup> Even under a subsequent statute<sup>4</sup> expressly providing that contingent liabilities should be provable, the courts failed to make much advance.<sup>5</sup> In the United States the Bankruptcy Acts of 1841<sup>6</sup> and 1867<sup>7</sup> provided for the proof of contingent claims, and their allowance on becoming absolute, or at a present valuation. This legislation received interpretation varying from the strictness of the English decisions<sup>8</sup> to a liberality which allowed proof of nearly all contingent claims.<sup>9</sup>

Instead of clearing up the matter, the Bankruptcy Act of 1898<sup>10</sup> entirely omitted any express provisions for the proof of contingent claims; as a result the authorities in this country are now in worse confusion than ever. It has been held under the Act, that by necessary implication and on the authority of the early English decisions, no contingent claims are provable.<sup>11</sup> The question arose once in the Supreme Court, but was not squarely decided, the court merely holding that the claim in question was not capable of valuation.<sup>12</sup> Following, however, several decisions in the lower federal courts,<sup>13</sup> it has recently been decided in New York that the liability of a bankrupt indorser of a promissory note, made before the filing of the petition but not due until afterwards, though within the time allowed for the proof of claims, is provable. *Cohen v. Pecharsky*, 121 N. Y. Supp. 602 (Sup. Ct.). The result seems eminently desirable, though it can be reached only by an extremely liberal construction of clause 4 of section 63 a, which allows proof of claims "founded upon a contract express or implied." If proof of such liabilities is to be allowed, it would seem that all contingent debts which are capable of valuation should be provable.<sup>14</sup> It is possible

<sup>1</sup> *Tully v. Sparkes*, 2 Ld. Raym. 1546. In a few cases where the debt was secured by a bond, of which the penalty had been forfeited before bankruptcy, proof was allowed. See *Ex parte Winchester*, 1 Atk. 116.

<sup>2</sup> 6 GEO. IV, c. 16, § 56.

<sup>3</sup> *Atwood v. Partridge*, 4 Bing. 209; *Boorman v. Nash*, 9 B. & C. 145. It was also required that the present value of the claim should be ascertainable with practical certainty. *Green v. Bicknell*, 8 A. & E. 701.

<sup>4</sup> ACT OF 1849, 12 & 13 VICT. c. 106, § 178.

<sup>5</sup> See *Amott v. Holden*, 18 Q. B. 593; *Kent v. Thomas*, L. R. 6 Ex. 312; ROBSON, BANKRUPTCY, 7 ed., 273; WILLISTON, CASES ON BANKRUPTCY, 491, note.

<sup>6</sup> 5 U. S. STAT. AT L. 444, § 5.

<sup>7</sup> 14 U. S. STAT. AT L. 526, § 10.

<sup>8</sup> See *French v. Morse*, 2 Gray (Mass.) 111; *Glenn v. Howard*, 65 Md. 40.

<sup>9</sup> See *Jemison v. Blowers*, 5 Barb. (N. Y.) 686; *Shelton v. Peace*, 10 Mo. 473; LOWELL, BANKRUPTCY, 124 *et seq.* Of course all contingent claims, not becoming absolute, had to be capable of valuation. *Riggins v. Magwire*, 15 Wall. (U. S.) 549.

<sup>10</sup> 30 U. S. STAT. AT L. 544, § 63; 3 U. S. COMP. STAT. (1901) 3418.

<sup>11</sup> *Goding v. Rosenthal*, 180 Mass. 43; In the Matter of McCauly & Sons, 2 Nat. Bankr. N. 1085. See 14 HARV. L. REV. 372.

<sup>12</sup> *Dunbar v. Dunbar*, 190 U. S. 340. See 22 HARV. L. REV. 605.

<sup>13</sup> *Moch v. Market St. Nat'l Bank*, 107 Fed. 897; *In re Smith*, 146 Fed. 923. *Contra*, *In re Schaefer*, 104 Fed. 973.

<sup>14</sup> But it is probable that a higher degree of certainty in valuing a contingent claim



to infer that Congress did not intend entirely to exclude proof of contingent debts, since the Act makes express provision for the liquidation of unliquidated claims against the bankrupt,<sup>15</sup> and for the proof of a debt by a surety of the bankrupt in case the creditor fails to prove it.<sup>16</sup>

The unsatisfactory condition of the law on this subject might have been avoided by adopting the provisions in the present English Bankruptcy Act,<sup>17</sup> which provide in the broadest possible language for the valuation and proof of contingent claims of every description. Under it the bankrupt is discharged from every liability, unless the claim is submitted for proof and declared by the court to be incapable of valuation.<sup>18</sup> This accomplishes, as nearly as is possible, what should be the principal objects of bankruptcy legislation; namely, to relieve the debtor of every existing liability, and to enable as many creditors as possible to receive dividends.

## RECENT CASES.

AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — LIABILITY OF AGENT FOR REFUNDING MONEY DUE THIRD PERSON. — The plaintiff sent to the defendant for collection a check which had been fraudulently drawn on the A bank by A's cashier, as the plaintiff probably knew. The A bank paid the check, but shortly afterward, on discovering the fraud, demanded back the money, and the defendant repaid it. *Held*, that the defendant is liable to the plaintiff for the amount repaid. *Monongahela Nat. Bank v. First Nat. Bank*, 75 Atl. 359 (Pa.).

If an agent receives money or property for his principal, he is generally estopped to deny his principal's title. *Roberts v. Ogilby*, 9 Price 269. This is true even if it in fact belongs to a third person, who could have demanded it back from the principal, for an agent is not allowed to set up a *jus tertii* unless the right has been asserted against him. *Day v. Southwell*, 3 Wis. 657. But if, upon demand, he holds the property for the true owner, or returns it to him, he has a good defense against his principal. *Biddle v. Bond*, 6 B. & S. 225; *Robertson v. Woodward*, 3 Rich. (S. C.) 251. For a refusal to surrender to the true owner on demand would be a conversion by the agent. *Doty v. Hawkins*, 6 N. H. 247. In the principal case, as the plaintiff probably knew of the cashier's wrongful act, he would not be entitled to recover or retain the money as against the A bank. *Stainback v. Bank of Va.*, 11 Gratt. (Va.) 269; *Amidon v. Wheeler*, 3 Hill (N. Y.) 137. Accordingly the decision seems erroneous, in denying to the agent a justification for refunding to the aggrieved bank.

ATTACHMENT — EFFECT OF LEVY BY MORTGAGEE ON MORTGAGED PROPERTY. — A chattel mortgagee attached the mortgaged goods, which were in the possession

would be required than under the earlier acts. See *In re Pettingill & Co.*, 137 Fed. 143.

<sup>15</sup> § 63 b.

<sup>16</sup> § 67 i. This section, however, merely insures to the surety that the original debt will be proved against the bankrupt. It does not enable him to prove his contingent claim on the bankrupt's implied contract of indemnity; and unless he can do so under § 63, the bankrupt is liable on it after his discharge. *Smith v. McQuillin*, 193 Mass. 289.

<sup>17</sup> ACT OF 1883, 46 & 47 VICT. c. 52, § 37. This substantially follows the ACT OF 1869, 32 & 33 VICT. c. 71, § 31.

<sup>18</sup> *Fothergill v. Hardy*, 13 App. Cas. 351. If the court decides that the claim is not capable of valuation, it is not provable and therefore not discharged. *Robinson v. Ommanney*, 23 Ch. D. 285.

of the mortgagor. Later the attachment was dissolved. An action was subsequently brought to foreclose the mortgage. By the state statute a chattel mortgagee has merely a lien. *Held*, that the right of foreclosure is not lost by the attachment. *Stein v. McAuley*, 125 N. W. 336 (Ia.).

Under the common-law view that a mortgagee has legal title to the mortgaged property, and that the equity of redemption cannot be attached, a mortgagee waives his title by levying on the property. *Evans v. Warren*, 122 Mass. 303. Since a man obviously cannot attach his own property, the mortgagee is taking a position inconsistent with his rights as legal owner, and the necessary inference is that he is thereby electing to give up his title and rely solely upon the attachment. But in jurisdictions where a mortgagee has only a lien, any creditor of the mortgagor can attach the property and hold it subject to the mortgage. *Beach v. Derby*, 19 Ill. 617. Hence if the mortgagee himself attaches he is not taking a position inconsistent with the continuance of his mortgage lien, and the principal case seems clearly correct in holding that there is no waiver. The decisions involving the same facts are in accord. *Barchard v. Kohn*, 157 Ill. 579.

**BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — TITLE TO PARTNERSHIP ASSETS WHEN SURVIVING PARTNER IS ADJUDGED BANKRUPT.** — One of two partners died. Thereafter the survivor was individually adjudged a bankrupt. *Held*, that title to the firm assets vests in the trustee in bankruptcy. *Hewitt v. Hayes*, 90 N. E. 985 (Mass.).

Under section 5 of the Bankruptcy Act of 1898, a partnership may be adjudged bankrupt, though its members are not. *In re Sanderlin*, 109 Fed. 857. Since this act treats a partnership as an entity, putting all the partners into bankruptcy no longer has a like effect on the firm. *In re Mercur*, 122 Fed. 384. If, however, a surviving partner takes absolute title to partnership assets, that title would vest in his trustee in bankruptcy. This view of his ownership is plausible, since it has been held that an allowance may be made to his widow from partnership assets, and that debts due from an individual partner may be set off against a claim by him as surviving partner. *Bush v. Clark*, 127 Mass. 111; *Holbrook v. Lackey*, 13 Met. (Mass.) 132. The better view, however, is that he holds as a fiduciary. *Farley, Spear & Co. v. Moog*, 79 Ala. 148. The rule that a surviving partner may not pay his individual debts with firm assets supports this theory. *Gable v. Williams*, 59 Md. 46. The fiduciary character of the surviving partner is even more clear if the partnership may correctly be regarded as an entity. When the firm is bankrupt but the partners are not, it is conversely held that the trustee cannot administer the separate estates of the partners. *In re Bertinshaw*, 157 Fed. 363. *Contra*, *In re Meyer*, 98 Fed. 976.

**BANKRUPTCY — PROVABLE CLAIMS — CONTINGENT DEBTS UNDER THE BANKRUPTCY ACT OF 1898.** — The defendant, after receiving a discharge in bankruptcy, was sued as accommodation indorser of a promissory note, which he had indorsed before the filing of the petition, but which did not fall due until afterwards, though within the time allowed for the proving of claims. *Held*, that the defendant's liability on the indorsement was a provable debt, and was therefore extinguished by the discharge in bankruptcy. *Cohen v. Pecharsky*, 121 N. Y. Supp. 602 (Sup. Ct.). See NOTES, p. 636.

**BANKS AND BANKING — COLLECTIONS — LIABILITY FOR DEFAULT OF SUB-COLLECTING AGENT.** — The A Bank, the indorsee of a note, gave it to the B Bank for collection, agreeing that the latter should be liable only for negligence in choosing its correspondents. The B Bank forwarded to the C Bank which in turn forwarded to the D Bank. The D Bank forwarded to the E Bank which negligently failed to present for payment, whereby the indorser was released. The maker was insolvent. The A Bank sued the D Bank. *Held*, that the D



Bank is not liable. *McBride v. Illinois Nat. Bank*, 121 N. Y. Supp. 1041 (Sup. Ct., App. Div.).

In the absence of special agreement many authorities hold the depository bank liable for any default of its correspondents on the ground of *del credere* agency. *Exchange National Bank of Pittsburgh v. Third National Bank of New York*, 112 U. S. 276. Other courts hold that the depository bank agrees merely to exercise due care in choosing a correspondent bank as agent for the depositor. *Wilson v. Carlinville National Bank*, 187 Ill. 222. See 14 HARV. L. REV. 384. Under the latter rule the E Bank alone would be liable in the principal case and the special agreement is immaterial. Applying the former rule, as the court here did, the result is still correct; for if the agreement with the depository bank makes the subsequent banks the depositor's agents the E Bank only is liable, while if its effect is limited to the B Bank the C Bank becomes the depository and is alone liable. But the theoretically correct result is reached under trust principles rather than rules of agency. See 18 HARV. L. REV. 300. Thus the D Bank has a right of action against the E Bank which it holds in trust for the C Bank and the C Bank holds this equitable right in trust for the B Bank which in turn holds its right in trust for the A Bank. Cf. *Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S. 50. Under this theory the agreement with the depository bank becomes immaterial, since the only claim asserted is through, not against, the B Bank.

**BILLS AND NOTES — DEFENSES — FRAUD AS DEFENSE AGAINST INDORSEE: BURDEN OF PROOF.** — The indorsee of a promissory note sued the maker, who pleaded that the note was procured from him by fraud. *Held*, that the plea is not demurrable. *Hill v. Ward*, 91 N. E. 38 (Ind.).

In general a transferee of a note can recover unless he is shown not to be a *bonâ fide* purchaser. *Collins v. Gilbert*, 94 U. S. 753. But if the note was fraudulently procured, a presumption arises that it has merely been given to the indorsee for collection. See *Bailey v. Bidwell*, 13 M. & W. 73. This has led the courts to declare that proof of fraud shifts to the plaintiff the burden of proving that he took without notice and for value. *Hutchinson v. Boggs & Kirk*, 28 Pa. St. 294. It would follow that the defendant need only plead the fraud of the payee. *Hutchinson v. Boggs & Kirk*, *supra*. It is submitted, however, that since the defendant is relying upon the affirmative defense of fraud, he should bear the burden of proving that his defense is available against the present plaintiff. His plea, therefore, should contain an allegation that the plaintiff took with notice or without giving value. *Harvey v. Towers*, 6 Exch. 656. The presumption raised by proof of fraud would impose upon the plaintiff the burden of going forward with evidence to rebut that presumption, but when the evidence is all in, the defendant should fail unless the preponderance is in his favor.

**BILLS OF PEACE — INSURANCE COMPANIES SEEKING TO ENJOIN SEPARATE ACTIONS.** — Four independent actions were brought at law in the state court against different insurance companies upon similar policies covering the same loss. Two of the defendants removed the cases to the federal court and thereafter joined in a bill in equity against the plaintiff and the other two defendants to have the respective liabilities of the several companies determined in a single action. *Held*, that the bill will not lie. *Rochester German Ins. Co. v. Schmidt*, 175 Fed. 720 (C. C. A., Fourth Circ.).

For a discussion of the principles involved see 23 HARV. L. REV. 480.

**CARRIERS — LOSS OR INJURY TO GOODS — GOODS SEIZED BY LEGAL PROCESS UNDER UNCONSTITUTIONAL STATUTE.** — The plaintiff delivered liquors to the defendant for carriage. While in the defendant's possession, they were seized by the sheriff and destroyed under a warrant issued in conformity with an unconstitutional state statute. The defendant after seizure and before destruc-

tion notified the plaintiff. *Held*, that the defendant is not liable. *Southern Express Co. v. Sottile Bros.*, 67 S. E. 414 (Ga.).

In an action against a carrier for non-delivery of goods, it is no defense that he has delivered to a person whom he reasonably but erroneously believed to be the owner. *Powell v. Myers*, 26 Wend. (N. Y.) 591. But he is not liable if, upon proper demand, he has delivered to the true owner, for he was bound to do so. *Bates v. Stanton*, 1 Duer (N. Y.) 79. Nor is he liable if he has been compelled by valid legal process to surrender the goods. *Stiles v. Davis*, 1 Black (U. S.) 101. It should be immaterial that the attachment suit was against a third party. *Stiles v. Davis*, *supra*. *Contra*, *Edwards v. Transit Co.*, 104 Mass. 159. If the writ is manifestly irregular, so that it could be resisted without risk, the carrier should be liable if he yields to it. *Nickey v. Ry. Co.*, 35 Mo. App. 79. But if it appears valid on its face, it would be a great hardship to compel a carrier to take the risk of unlawfully resisting an officer, in order to avoid liability to the bailors. *Contra*, *Kiff v. Ry. Co.*, 117 Mass. 591. Since the defendant in the principal case could not be expected to judge of the constitutionality of the statute under which the writ was issued, it is submitted that he was properly excused. See *McAlister v. Railroad Co.*, 74 Mo. 351.

**CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — INSPECTION OF CORPORATE BOOKS AND RECORDS.** — To a petition for a writ of mandamus for an inspection of the corporate books and records, the directors pleaded that the stockholder was wholly lacking in good faith. *Held*, that the plea is not demurrable. *Wight v. Heublein*, 75 Atl. 507 (Md.).

At common law a stockholder had a right to inspect the corporate books and records at all reasonable times, provided he made out a proper purpose. *State v. Kellogg*, 165 Ill. 192. This common-law right has never been superseded, and is frequently affirmed by legislative provisions. *Matter of Steinway*, 31 N. Y. App. Div. 70. In England a dispute between the stockholder and the corporation or other stockholders is usually a condition precedent to the exercise of the stockholder's right. *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115. In this country greater freedom is allowed. The stockholder has apparently an almost absolute right which he can enforce by mandamus. *Weihenmayer v. Bitner*, 88 Md. 325. A personal inspection is not required: abstracts may be taken by an expert accountant. *Cincinnati Nolskblatt Co. v. Hoffmeister*, 62 Oh. St. 189. Yet the court in the exercise of its sound discretion will not grant the writ to aid speculative purposes or blackmail, or to gratify mere curiosity. See *Guthrie v. Harkness*, 199 U. S. 155, 156. The Supreme Court, however, puts on the corporation the burden of showing the stockholder's improper purpose. See *Guthrie v. Harkness*, *supra*. In this respect the original common-law doctrine seems preferable. Yet the principal case represents the tendency of the modern decisions, in regarding lack of good faith as an affirmative defense to be proved by the corporation. *State ex rel. Weinberg v. Pacific Brewing, etc. Co.*, 21 Wash. 451.

**CORPORATIONS — ULTRA VIRES CONTRACTS: RIGHTS AND LIABILITIES OF PARTIES — RECOVERY IN QUANTUM MERUIT.** — A was indebted to the B corporation to the extent of \$10,000. At the request of B, the C corporation made a loan of \$12,000 to A, the repayment of which was guaranteed by B. Then, in accordance with a prior agreement, A paid \$10,000 of this sum to B. A defaulted. On C's suing B upon the latter's guaranty B pleaded *ultra vires*. *Held*, that C can recover \$10,000 in *quantum meruit*. *Citizens' Central National Bank v. Appleton*, 30 Sup. Ct. 364. See NOTES, p. 627.

**EMINENT DOMAIN — COMPENSATION — WHEN REPRODUCTIVE COST IS ADMISSIBLE IN EVIDENCE.** — In proceedings to condemn land for a bridge abutment, evidence by a carpenter of the cost of reproduction of tenements on the land was excluded. *Held*, that it should have been admitted. *Matter of Blackwell's Island Bridge*, 91 N. E. 278 (N. Y.). See NOTES, p. 632.



ESCROWS — DEEDS — DELIVERY TO AGENT OF GRANTEE. — A deed was delivered by the grantor to the purchasing agent of the grantee, to be held until the purchase price was paid. *Held*, that this is an effective delivery in escrow. *Alabama Coal & Coke Co. v. Gulf Coal & Coke Co.*, 51 So. 570 (Ala.).

It is commonly said that a deed in escrow must be delivered to a stranger to it. See *SHEP. TOUCH.* 58. But see *London, etc. Prop. Co. v. Baron Suffield*, [1897] 2 Ch. 608, 621. A delivery to the grantor's agent as such agent cannot be a delivery in escrow, for the grantor still has complete control. *Day v. Lacasse*, 85 Me. 242. Nor can a delivery to the grantee's agent as such be other than absolute, for this is in law a delivery to the grantee. *Bond v. Wilson*, 129 N. C. 325. The agent of one of the parties, however, may be made agent of both, or depository of the deed, and a delivery to him as depository is a delivery in escrow. *Ashford v. Prewitt*, 102 Ala. 264. Since at the time of delivery the bargain is complete, nothing is left to the discretion of the depository, and his position as stakeholder is not irreconcilable with that of agent of one of the parties. See *Nolte v. Hulbert*, 37 Oh. St. 445, 447. Hence "stranger" in the rule above stated means one who is not personally or legally identified in the matter of delivery with a party to the deed. *Cincinnati, Wilmington, & Zanesville R. Co. v. Iliff*, 13 Oh. St. 235. And as it is clear in the principal case that the deed was delivered to the grantee's agent as depository, the holding seems correct.

EVIDENCE — ADMISSIONS — HUSBAND'S ADMISSIONS AGAINST WIFE. — In an action by a wife, joined by her husband, on a benefit certificate in her favor, the court charged that the testimony of the husband at a previous trial was receivable only for the purpose of impeaching his credibility as a witness, and not as an admission. *Held*, that the charge is erroneous. *Knights of Modern Macabees v. Gillis*, 125 S. W. 338 (Tex., Ct. Civ. App.).

The admissions of any party to the record were formerly held receivable in evidence. *Baerman v. Radenius*, 7 T. R. 663. But the declarations of a nominal party, as a next friend, are now often excluded as admissions, though they may be used to impeach his credibility as a witness. *Buck v. Maddock*, 167 Ill. 219. It has even been held that the declarations of a representative, as a trustee or an executor, are not competent to prejudice the persons beneficially interested. *Graham v. Lockhart*, 8 Ala. 9. The weight of authority, however, seems to favor the reception of the declarations of a representative, if made by the declarant in his representative capacity. *Horkan v. Benning*, 111 Ga. 126; *Niskern v. Haydock*, 23 N. Y. App. Div. 175. The declarations of a husband as to his wife's separate estate, not made by him as her agent, are not evidence against her, though he be a party to the record. *Aldrich v. Earle*, 13 Gray (Mass.) 578. But because of the rights under the laws of Texas of a husband in property acquired by his wife, it seems that in the principal case the husband had a substantial interest in the action. *SAYLES' TEX. CIV. STAT.*, Art. 2967, 2968. Hence his declarations should have been received as admissions. *Cf. Shaddock v. Town of Clifton*, 22 Wis. 114.

INSURANCE — DEFENSES OF INSURER — PROPERTY USED IN ILLEGAL BUSINESS. — The defendant insured against fire the plaintiff's building and the furniture in it. The policy expressly described the building as "occupied as a sporting house" — meaning a house of ill-fame. After the policy was issued but before the property was destroyed by fire, the immoral use ceased. *Held*, that the insured can recover. *Morin v. Anglo-Canadian Fire Insurance Co.*, 12 Western L. Rep. 387 (Alberta, Trial, Dec. 2, 1909). See NOTES, p. 635.

INTERSTATE COMMERCE — CONTROL BY STATES — ATTACHMENT OF ROLLING STOCK ENGAGED IN INTERSTATE COMMERCE. — Under an Iowa statute, writs of attachment were levied upon certain cars in the possession of local companies

under an agreement providing that such companies should forward, reload, and return them to the defendant railroad, an Indiana corporation. The cars were standing empty when attached. *Held*, that the cars are subject to judicial process, although engaged in interstate commerce. *Davis v. Cleveland, Cincinnati, & St. Louis Ry.*, 30 Sup. Ct. 463.

This important question, hitherto undetermined by the Supreme Court, presented a conflict in the state courts. See *Wall v. Railroad Co.*, 52 W. Va. 485; *Southern Ry. Co. v. Brown*, 131 Ga. 245. The present decision is of most importance in deciding that the action Congress has taken concerning the forwarding of cars engaged in interstate commerce does not prevent their attachment. See U. S. COMP. ST. (1901) pp. 3564, 3154. The state statute providing for such judicial process is held not unconstitutional, although broader statutes have been construed not to apply to cars in this situation. *Michigan Central Ry. Co. v. Chicago & Michigan Lake Shore Ry. Co.*, 1 Ill. App. 399. Therefore the court will decide in each particular case whether or not the attachment is void. The opinion in the principal case is confined to the facts presented, which are the least difficult of determination. But it is believed that the Court will be very unwilling to restrict the states in such an important function as the collection of debts, when there is no legislative act of the state directly affecting interstate commerce. *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388; *The Winnebago*, 205 U. S. 354. Certainly the former distinction between foreign and domestic attachment will be disregarded. *Connery v. Quincy, Omaha, & Kansas City Ry. Co.*, 92 Minn. 20. Indeed it would be wise to take the position that no judicial process under the usual attachment laws is invalid. But see 20 HARV. L. REV. 319.

INTERSTATE COMMERCE — CONTROL BY STATES — EFFECT OF POSTPONEMENT CLAUSE IN FEDERAL STATUTE. — A federal statute was passed prescribing a maximum number of hours of employment for telegraph operators engaged in interstate transportation. This statute was not to take effect until one year after its passage. During this period a state statute was passed fixing a shorter maximum number of hours for railroad telegraph operators. The defendant, an interstate carrier, was sued for a violation of this state statute, committed before the federal statute went into effect and relating to the employment of an operator having to do with interstate trains. *Held*, that the state statute is invalid. *People v. Erie R. R. Co.*, 135 N. Y. App. Div. 767.

In matters of interstate commerce which do not require uniformity throughout the United States the power of Congress is only potentially exclusive and the states have concurrent jurisdiction until Congress acts. *Cooley v. Board of Wardens of Phila.*, 12 How. (U. S.) 299; *Nashville, etc. Ry. v. Alabama*, 128 U. S. 96. The number of hours of employment of telegraph operators directing the operation of interstate trains is not a subject so national in character as to require uniformity, and therefore regulation is allowable under the police power reserved to the states. *State v. Chicago, M. & St. P. R. R. Co.*, 136 Wis. 407. *Cf. Smith v. Alabama*, 124 U. S. 465. Likewise Congress has power to regulate such matters. See *Employers' Liability Cases*, 207 U. S. 463, 495. A statute may exist for many purposes before it actually goes into effect. *The People v. Inglis*, 161 Ill. 256; *Stine v. Bennett*, 13 Minn. 153. In the present case the federal act was effective immediately on its passage as a declaration of the purpose of Congress to assume exclusive jurisdiction. Therefore the statute was rightly held to represent sufficient congressional action to exclude future state legislation on the same subject. *State v. Mo. Pac. Ry. Co.*, 212 Mo. 658; *State v. Chicago, M. & St. P. R. R. Co.*, *supra*. But as to state statutes in force before its passage, it is submitted that the federal act should have no effect during the postponement period. Thus a federal bankruptcy law with a similar postponement clause does not suspend existing state insolvent laws until the day it goes into effect. *Larrabee v. Talbot*, 5 Gill (Md.) 426, 441.



INTERSTATE COMMERCE — CONTROL BY STATES — STATE TAXATION OF TELEGRAPH COMPANIES EXERCISING FEDERAL PRIVILEGES. — A foreign telegraph company which had accepted the provisions of a federal statute authorizing the construction and operation of lines along post roads, etc., was subjected to a license tax on its intrastate business. A part of the business of the company was interstate and a part consisted of sending messages for the federal government as required by the statute. *Held*, that the tax is not unconstitutional. *Williams v. City of Talladega*, 51 So. 330 (Ala.).

A state cannot interfere with the exercise of federal powers. *M'Culloch v. The State of Maryland*, 4 Wheat. (U. S.) 316. But a telegraph company which, as in the principal case, has accepted the rights conferred by the federal statute may be taxed on account of property owned and used within the state. *Western Union Telegraph Co. v. The Attorney General of the Commonwealth of Massachusetts*, 125 U. S. 530. A tax on gross receipts derived from intrastate business is constitutional. *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411. And a municipal charge for the use of city streets is valid. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92. But it has been held that the federal franchise of a railroad company is not taxable by the state. *California v. Central Pacific Railroad Co.*, 127 U. S. 1. Similarly, a tax upon the franchise of a telegraph company operating under a federal statute has been held unconstitutional. *City & County of San Francisco v. Western Union Telegraph Co.*, 96 Cal. 140; *Western Union Telegraph Co. v. Lakin*, 53 Wash. 326. But in a decision in which the railroad case was not referred to, the United States Supreme Court has upheld a municipal license tax on a telegraph company, as a valid exercise of the police power. *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692. Although there is a shadowy distinction between a franchise tax and a license tax, the cases may be reconciled on the ground that the vital question is always whether the tax does in effect interfere with the national purpose. See *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5, 30. If the distinction does not seem justifiable, the decision in the principal case is to be preferred.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — CORRESPONDENCE SCHOOLS. — The plaintiff, a Pennsylvania corporation, contracted with the defendant in Kansas to instruct him by correspondence for a consideration. The plaintiff sued for breach of this contract in a Kansas court, which held that the plaintiff was debarred from suing, as it had not complied with certain regulations imposed by Kansas statutes. The decision was upheld in the Supreme Court of Kansas and this writ of error was then brought. *Held*, that the statutory regulations are void, as a burden on interstate commerce. *International Textbook Co. v. Pigg*, U. S. Sup. Ct., April 4, 1910.

The court places little reliance on the fact that the plaintiff's business involved the transportation of tangible articles of traffic such as books. It seems rather to be held that the importation of information from one state into another is, of itself, commerce. A state court has reached an opposite result in a case in which the same question was argued, the court being of the opinion that it was governed by the reasoning of those decisions in which the writing of insurance by a foreign corporation was held not to constitute interstate commerce. *International Textbook Co. v. Peterson*, 133 Wis. 302; *Paul v. Virginia*, 8 Wall. (U. S.) 168. The telegraph cases are cited as supporting the present decision. But the operation of the telegraph was brought under the commerce clause as being a necessary adjunct of commerce, and not on the ground that sending a telegram of itself was commerce. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1. The principal case is additional proof that the insurance cases must be confined strictly to the points actually decided.

LANDLORD AND TENANT — CONDITIONS IN LEASE — EFFECT OF WAIVER. — A landlord, with notice of a subletting in breach of condition, received rent ac-

cruing thereafter. *Held*, that he will be restrained from entering for the breach in question, but that the condition is still in force as to subsequent breaches. *Beckenbach v. Harlow*, 31 Oh. C. C. 496. See NOTES, p. 630.

**LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — IRRELEVANT STATEMENTS IN PLEADINGS.** — In a former action, the present defendant, in his pleadings, made false and defamatory statements concerning the present plaintiff. The latter had no connection with the suit, and the statements were irrelevant. *Held*, that the privilege is destroyed by the irrelevancy. *Potter v. Troy*, 175 Fed. 128 (Circ. Ct., S. D. N. Y.).

The prevailing view in the United States is that all statements made by the parties in their pleadings, if relevant to the matters in issue, are absolutely privileged. *Gaines v. Aetna Ins. Co.*, 20 Ky. L. Rep. 886. This is true even if they are directed against third parties not connected with the suit. *Crockett v. McLanahan*, 109 Tenn. 517. See 16 HARV. L. REV. 603. But if the statements are irrelevant, there is no privilege. *Harlow v. Carroll*, 6 App. Cas. (D. C.) 128. See *Hoar v. Wood*, 3 Met. (Mass.) 193. In determining what is relevant, the courts are not technical, and if the defendant might reasonably have believed that the allegations would be subject to inquiry during the trial, he is not liable. See *Union Mut. Life Ins. Co. v. Thomas*, 83 Fed. 803. On the other hand, the English courts have held that all statements made in the course of judicial proceedings are absolutely privileged, even if immaterial. *Aslley v. Younge*, 2 Burr. 807; *Seaman v. Netherclift*, 1 C. P. D. 540. Parties must frequently allege facts which may be libelous, and England has adopted this rule to assure free access to the courts. See *Kennedy v. Hilliard*, 10 Ir. C. L. 195. But such a restriction as American courts have placed on malignant parties cannot hinder the administration of justice.

**MANDAMUS — PERSONS SUBJECT TO MANDAMUS — SENATORS AND MEMBERS OF CONGRESS.** — The plaintiff instituted proceedings for a mandamus against the several members of the United States Senate and House of Representatives comprising the Joint Committee on Printing of Congress, to compel the acceptance of a bid submitted by him. *Held*, that the court has jurisdiction to hear and determine the controversy. *Valley Paper Co. v. Smoot et al.*, 38 Wash. L. R. 170 (D. C., Sup. Ct., Feb. 28, 1910). See NOTES, p. 633.

**MUNICIPAL CORPORATIONS — NUISANCES — CITY'S RIGHT TO MAINTAIN BILL IN EQUITY TO ENJOIN A NUISANCE.** — A municipality was authorized by its charter to determine what constitute public nuisances and to prevent, restrain, remove, and abate the same. Without passing any ordinance relating to smoke nuisances, the city brought a bill in equity to enjoin the maintenance by the defendant of such a nuisance. No damage to municipal property was shown. *Held*, that the city cannot maintain the action. *City of Yonkers v. Federal Sugar Refining Co.*, 121 N. Y. Supp. 494 (Sup. Ct. App. Div.).

A municipal corporation like a private corporation may always bring a bill in equity to enjoin a nuisance which peculiarly affects the corporate property. *Coast Company v. Spring Lake*, 56 N. J. Eq. 615. The right to regulate and abate public nuisances is, however, dependent upon power delegated by the state. Whether a general delegation of police power to declare and abate nuisances carries with it a power to bring a bill in equity in the interest of the public is a question upon which the authorities are apparently in conflict. *City of Huron v. Bank of Volga*, 8 S. D. 449. *Contra*, *Dover v. The Portsmouth Bridge*, 17 N. H. 200, 215. But all the cases in which such bills have been refused seem to have concerned nuisances arising from sources outside the city's jurisdiction or respecting which no ordinance had been passed. *Township of Belleville v. Orange*, 70 N. J. Eq. 244; *City of Ottumwa v. Chinn*, 75 Ia. 405. And most of



the cases in which such bills have been allowed have presented merely the question of the proper method of exercising the police power of the city after the passage of an ordinance applicable to the nuisance at issue. *New Orleans v. Lambert*, 14 La. Ann. 247; *Village of Pine City v. Munch*, 42 Minn. 342. It is submitted that an injunction should always issue at the suit of a municipality in the proper exercise of its police power, though not when based solely upon the property rights of the public.

**PARTNERSHIP — DISSOLUTION — RIGHT OF LIQUIDATING PARTNER TO COMPENSATION.** — A and B were partners. A held title to certain lands in trust for the firm and other investors. On a dissolution of the firm, A was permitted by the receiver to continue the partnership investment. *Held*, that for his services he can have no compensation out of the partnership funds. *Ruggles v. Buckley*, 175 Fed. 57 (C. C. A., Sixth Circ.).

A partner is under an obligation to render his services to the firm in firm business, and in the absence of an express or implied agreement can demand no compensation therefor. *Roach v. Perry*, 16 Ill. 37. By the better view, this includes the obligation to wind up the firm on its dissolution by death, or otherwise. *Dunlap v. Watson*, 124 Mass. 305; *Smith v. Knight*, 88 Ia. 257. *Contra*, *Bradley v. Chamberlin*, 16 Vt. 613. If, however, the liquidating partner rightfully continues the business and makes profits, he is doing more than the partnership agreement requires, and if the other partner or his representatives elect to take the profits produced by the capital left by them in the business, they should allow compensation for services. *Moore v. Rawson*, 185 Mass. 264, 199 Mass. 493; *Cameron v. Francisco*, 26 Oh. St. 190; *O'Neill v. Duff*, 11 Phila. (Pa.) 244; *Re Aldridge*, [1894] 2 Ch. 97. The court in the principal case rests its decision largely on the fact that no new venture was entered upon. This seems hardly an adequate reason. See *Griggs v. Clark*, 23 Cal. 427. The decision may, however, be supported on the ground that the services for which compensation was sought were rendered in administering the trust lands, and not in administering the only partnership property left in the plaintiff's hands — namely, the interest of the partnership as a *cestui* therein.

**POLICE POWER — REGULATION OF BUSINESS AND OCCUPATION — COMPULSORY INCORPORATION OF BANKS.** — A state statute required all persons engaged in banking to incorporate within three months. By earlier statutes incorporated banks were regulated more in detail than banking firms and individuals. At least three persons had to associate to form a corporation. *Held*, that the statute is not unconstitutional. *Weed v. Bergh*, 124 N. W. 664 (Wis.). See NOTES, p. 629.

**PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — EXCLUSIVE TELEPHONE CONTRACT.** — A contract between two telephone companies gave each the exclusive right to have transmitted over its lines all messages coming from the lines of the other, destined to points on the lines of the connecting company. *Held*, that the contract is void. *Home Telephone Co. v. Granby & Neosho Telephone Co.*, 126 S. W. 773 (Mo.).

For a discussion of the principles involved, see 23 HARV. L. REV. 54.

**PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — NECESSITY FOR NOTICE OF WITHDRAWAL AFTER EXPIRATION OF FRANCHISE.** — After the expiration of its franchise, a water-supply company continued to supply water with the acquiescence of the municipality. Thereafter the company gave notice of its intent immediately to withdraw from service. The company then sought to enjoin the city from interfering with the removal of the plant. *Held*, that the relation existing between the city and the water company can be terminated at will

by either party and any interference will be enjoined. *Laighton v. City of Carthage*, 175 Fed. 145 (Circ. Ct., S. W. D. Mo.).

A city may be given the power to grant a franchise. *Los Angeles Water Co. v. Los Angeles*, 88 Fed. 720. When a company whose franchise has expired continues operations for some time with the consent of such a city, a grant of a franchise is implied. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Ia. 234. See *Cincinnati Ry. Co. v. Cincinnati*, 44 N. E. 327 (Oh.) The relation thus created, being of uncertain length, can be terminated by either party. But while it exists the company remains a public service company and is subject to all the obligations incident thereto. It must continue to serve all at reasonable rates and is subject to regulation. *Cedar Rapids Water Co. v. Cedar Rapids*, *supra*. Public service in general involves also the duty to give reasonable notice of withdrawal from service. See 16 HARV. L. REV. 363, 555-566. In the case of a water-supply company it would seem that the city must be given a reasonable time to procure a substitute. The expiration of the franchise might well be a sufficient notice to the city, if the company chose to withdraw at that time. But if it continues to operate thereafter and if we assume, as the court does, that it is not acting illegally in so doing, there appears to be no good reason for releasing it from the duty to give due notice of its withdrawal. The very undesirable result of the principal case seems unsupportable.

**RULE AGAINST PERPETUITIES — SEPARABLE LIMITATIONS IN TRUST FOR SALE.** — A testator left property to trustees to pay the income to his children for life, each child having a power to appoint to his or her prospective wife or husband for life. Upon the death of the last surviving child and of such wives and husbands as should take, the trustees were directed to sell. None of the children ever exercised the power. Held, that the trust for sale is valid. *In re Davies & Kent's Contract*, 45 L. J. 206 (Eng., Ch. D., Feb. 17, 1910).

In England a trust for sale which may become operative only after lives in being and twenty-one years is void under the rule against perpetuities. *Goodier v. Edmunds*, [1893] 3 Ch. 455; *In re Appleby*, [1903] 1 Ch. 565. The period is reckoned to the time when the trust becomes operative, so that, even though the trust for sale may be regarded as a vested interest, it is nevertheless assailable as a perpetuity. See *Goodier v. Edmunds*, *supra*; *In re Davenport*, [1893] 3 Ch. 421. In the principal case, inasmuch as one of the children might have married and appointed to a person not born at the death of the testator, the trust for sale might not have become operative within the required limits. Nevertheless it is held good, seemingly by separating the limitation into two limitations, in one of which the trust for sale is to take effect on the death of the survivor of the children in the event of no appointment being made. Such a limitation would be valid. This must be regarded as an exception to the rule that a gift expressed in one limitation cannot be divided unless separable in its terms. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 331, 338.

**TAXATION — COLLECTION AND ENFORCEMENT — EQUITY JURISDICTION.** — A *bonâ fide* holder of a duly authorized county bond, having obtained judgment against the county, which by various devices had succeeded in evading payment, filed a bill in equity against the defendant railroad which was a taxpayer of the county. He alleged that the assessment of the defendant's property towards the payment of the judgment created a lien in his favor which he was entitled to foreclose. The defendant demurred on the ground that the tax could be recovered only by the proper local official, as provided by statute. Held, that the demurrer must be sustained. *Preston v. Chicago, St. L. & N. O. R. Co.*, 175 Fed. 487 (Circ. Ct., W. D. Ky.).

Since a special remedy of another nature was provided by the state legislature, the court properly refused to allow a suit by the creditor in his own name. *Oli:er*



v. *Colonial Gold Co.*, 93 Mass. 283. The opinion declares, however, that in the absence of statutory authority a suit in equity could not be maintained for the collection of taxes assessed upon property. See *Heine v. The Levee Commissioners*, 19 Wall. (U. S.) 655. Though such a proposition seems to have the support of the authorities, it is submitted that upon principle exception may be taken. It is conceded that when there exists a power to tax, incidental to power to incur the debt, a duty to tax, dependent upon a valid debt, and a refusal by the proper official to enforce the tax, mandamus will lie to make that officer perform his ministerial duty. *Thompson v. Allen County*, 115 U. S. 550. If, however, the official resigns before he can be served with the writ, it seems to follow that we have a clear case for equity jurisdiction. There is no adequate and complete remedy at law. *Rees v. City of Watertown*, 19 Wall. (U. S.) 107. So on well recognized theories it seems that equity, even without express statutory authority, should see that the recalcitrant officer's duty is done, ordering its own official to levy and collect the taxes named, in conformity with the laws of the state for the collection of such taxes. *Welch v. Ste. Genevieve*, 1 Dill. (U. S.) 130. See *Supervisors v. Rogers*, 7 Wall. (U. S.) 175.

TAXATION — PARTICULAR FORMS OF TAXATION — APPLICATION OF INHERITANCE TAX TO EXECUTION BY FOREIGN WILL OF POWER CREATED IN DOMESTIC WILL. — A, by a New York will, gave B a power of appointment over a trust fund. B, in a New Jersey will, exercised the power in favor of C. Both B and C came within the one per cent class of the New York Transfer Tax Act of 1897. Under the law existing when A died they would have been exempt. Held, that C takes the fund free from the New York transfer tax. *In re Kissel's Estate*, 121 N. Y. Supp. 1088 (Sur. Ct.).

Estates created by the execution of a power of appointment are as a general rule treated as if created by the instrument raising the power. Thus a suspension of alienation in the second instrument is invalid if such would have been its effect annexed to the estates in the first instrument. *Genet v. Hunt*, 113 N. Y. 158. And the validity of the exercise of a power is tested by the law of the jurisdiction in which it was created. *Cotting v. De Sartiges*, 17 R. I. 668. But for the purposes of taxation, statutes both in England and in this country have treated the estates of the appointees as derived from the donee of the power. *Attorney-General v. Upton*, L. R. 1 Exch. 224; *Appeal of Seibert*, 110 Pa. St. 329; N. Y. TAX LAW, § 220, par. 5. The tax upon the execution of the power is not a tax upon property but upon the exercise of a privilege. *Chanler v. Kelsey*, 205 U. S. 466. There appears no reason why the estate of the appointee should not be taxed under both instruments since both are necessary to his title, but such is not the interpretation put upon the statutes. *Vandiest v. Fynmore*, 6 Sim. 570; *Matter of Howe*, 86 N. Y. App. Div. 286. In the principal case, since the creation of the power was not taxable and since its execution was effected under a New Jersey instrument, the decision seems sound.

TELEGRAPH AND TELEPHONE COMPANIES — STATUS OF COMPANIES AS ENGAGED IN PUBLIC EMPLOYMENT — OBLIGATION TO SERVE ALL AT REASONABLE RATES. — Held, that a telegraph company is entitled to service from a telephone company at the same rates as other business customers. *Postal Telegraph-Cable Co. of Tennessee v. Cumberland Telephone & Telegraph Co.*, 43 N. Y. L. J. 165 (U. S. Circ. Ct., Mid. D. Tenn., March 31, 1910).

On a general theory that the value of service to the consumer is a factor in the determination of rates, the defendant sought to justify the differentiation in the principal case. Recent federal authority, indeed, allows a carrier in rating different commodities to charge most heavily those which can best afford to pay. *Interstate Commerce Commission v. Chicago Great Western Railway Co.*, 141 Fed. 1003. But, as another circuit had recognized, where the cost of carrying different

kinds of goods is the same, to permit a company to charge different prices is to give it a right to hamper prospering industries and pamper those in distress, against that public policy which lies at the root of the law of public service. See *Tift v. Southern Railway Co.*, 138 Fed. 753. And as to customers receiving identical service, to admit that the successful shall pay more than the struggling is simply to say that a railroad or telephone corporation may levy a progressive income tax. By the principal case it is decided that one in the public employment may not charge what the particular customer can pay; it remains to be determined that he may not charge for a particular service what the traffic will bear. See *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92.

**TRUSTS — RESTRAINTS ON ALIENATION OF CESTUI'S INTEREST — SPENDTHRIFT TRUST CREATED BY BENEFICIARY.** — X, a spendthrift, conveyed an estate to Y, on trust to pay X during his life such sums out of the profits as Y should think proper. It was expressly provided that Y should not be compellable to pay X any part of the profits; and that on the death of X the *corpus* together with accumulations was to go to the appointees of X. *Held*, that the estate is liable for the subsequent debts of X. *Petty v. Moores Brook Sanitarium*, 67 S. E. 355 (Va.).

Even in jurisdictions where spendthrift trusts are upheld when created by a third party, they are invalid if founded for the grantor's own benefit. *Schenck v. Barnes*, 156 N. Y. 316; *Jackson v. Von Sedlitz*, 136 Mass. 342. It is axiomatic, however, that unless a *cestui* has an enforceable claim against his trustee there is nothing which his creditors can reach. *In re Coleman*, 39 Ch. D. 443; *Davidson's Executors v. Kemper*, 79 Ky. 5. Where the trustee has discretion merely as to the mode of applying the fund, the *cestui's* interest is available for his debts. *Snowdon v. Dales*, 6 Sim. 524; *Stewart v. Madden*, 153 Pa. St. 445. But in the case considered the *cestui* has no claim which equity would enforce, and it is difficult to see against what interest the creditor levied equitable execution. *Holmes v. Penny*, 3 K. & J. 90. See GRAY, RESTRAINTS ON ALIENATION, 2 ed., §§ 163-166. The creditor is amply protected in such a case by holding the trustee accountable for actual payments to the *cestui* after notice of the claim. *In re Neil*, 62 L. T. N. S. 649. The court, following a recent decision, regards the scheme employed as an evasion of the law and hence against public policy. *Menken v. Brinkley*, 94 Tenn. 721. If this is true, it is submitted that the remedy is to have the conveyance set aside rather than to levy equitable execution.

**TRUSTS — RESULTING TRUSTS — EFFECT OF PARTIAL FAILURE OF CHARITABLE TRUST ON POWER OF SALE.** — A devised land to his executors on trust to sell the same and divide the proceeds among named charities. As to eleven-seventeenths of the land the trust failed. The executors sold the land to B, and the heirs asked for a partition thereof. *Held*, that although the eleven-seventeenths passed to the heir as intestate property, the executors under their power of sale gave good title to the whole. *Bender v. Paulus*, 90 N. E. 994 (N. Y.).

It has been held that where a trust fails for vagueness, the devise fails as well and the property goes as intestate. *Scott v. Brownrigg*, 9 L. R. Ir. 246. But according to the prevailing view, if the purposes of a trust fail partially or wholly, the devisees hold the property on a resulting trust to the heirs. *Longley v. Longley*, L. R. 13 Eq. 137; *Sims v. Sims*, 94 Va. 580. Since, however, a resulting trust connotes something analogous to intestacy as to the beneficial interest, and since the testator devised his absolute interest to the executors, the latter should hold rather on a constructive trust. See 5 HARV. L. REV. 392, 393. In New York, statutes making invalid certain gifts to charities are regarded as limiting the testator's power to give, so that the devise fails to the same extent as the trust and the legal title goes *pro tanto* to the heirs. *Jones v. Kelly*, 170 N. Y. 401; *Chamberlain v. Chamberlain*, 43 N. Y. 424. For this construction there is some authority. *Doe v. Wrighte*, 2 B. & Ald. 710. *Contra*, *Russell v. Jackson*, 10 Hare



204. But whether or not the legal title descends to the heir, there is no reason why the power of sale given the executors should not subsist for the benefit of the interests which do not fail, while convenience usually demands that it should. *Hall v. Rich*, 59 N. J. Eq. 492.

WITNESSES — PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT: TESTATOR'S INSTRUCTIONS CONCERNING WILL. — A testator's first will was admitted to probate. His second will, not being found, was presumed to have been destroyed by him. The attorney's office copy of this second will was offered, to show that it revoked the first will. *Held*, that the testator's communications to his attorney are privileged, and the copy inadmissible. *Matter of Cunnion*, 135 N. Y. App. Div. 864.

To allow a man to obtain legal advice without fear of prejudicing his interests, the law protects confidential communications between attorney and client. *Greenough v. Gaskell*, 1 Myl. & K. 98; *Whiting v. Barney*, 30 N. Y. 330. In testamentary affairs, the death of the testator removes the reason for the protection and generally terminates the privilege. *Russell v. Jackson*, 9 Hare 387; *Doherty v. O'Callaghan*, 157 Mass. 90. See WIGMORE, EVIDENCE, § 2314. But the provision of the New York Code is very strict, making the privilege absolute unless expressly waived by the client at the trial. N. Y. CODE CIV. PROC. §§ 835, 836; *Loder v. Whelpley*, 111 N. Y. 239. Since a testator obviously cannot make such a waiver, this rule has led to injustice and has been judicially amended. Only communications intended, when made, to be confidential are privileged. *Matter of Smith*, 61 Hun (N. Y.) 101; *Matter of McCarthy*, 55 Hun (N. Y.) 7; *Whiting v. Barney*, *supra*. The privilege is waived when the attorney witnesses the will. *Matter of Coleman*, 111 N. Y. 220; *Matter of Sears*, 33 N. Y. Misc. 141. If the will is lost after the testator's death, public policy determines the privilege. *Sheridan v. Houghton*, 16 Hun (N. Y.) 628. The testator in the main case, by destroying the will, indicated that he desired the privilege to continue. If the purpose of the rule is to respect the client's wishes, and so insure freedom in his dealings with his attorney, the case must be supported.

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## BOOK REVIEWS.

A TREATISE ON THE LAW OF INSURANCE IN ALL ITS BRANCHES. By George Richards. Third Edition. Enlarged and Rewritten. New York: The Banks Law Publishing Company. 1909. pp. xxvii, 959.

The earlier editions of this book were prepared primarily for students. They contained about three hundred pages of treatise and about the same number of pages of reported cases, with an appendix of statutes and forms. The present edition contains a treatise of almost seven hundred pages, omits the cases, and devotes to statutes and forms an appendix of more than a hundred pages. The volume now appeals primarily to practitioners. Despite the absence of a table of cases, it is well adapted to be useful to its new audience, provided the reader has already had careful instruction in the subject discussed.

The author's own view is that of a practitioner. This is indicated here and there by comments which would be quite impossible for any lawyer to make who has not had much to do with insurance litigation. It is indicated also by careful descriptions of the mode in which the insurance business is carried on. The only shortcomings discovered in these descriptions are that the author does not explain the functions and powers of the various persons who are by the public indiscriminately termed insurance agents, and that he quite unintentionally gives the im-

pression that the members of the English Lloyd's write policies as a society. Yet these are trivial shortcomings, and the mention of them should not materially modify the recognition that the author gives in his opening chapter and elsewhere a useful insight into insurance as a business.

When the author explains not business but the law, it becomes clear that the practitioner's point of view, notwithstanding its advantages, may bring the disadvantage of minimizing, or perhaps not perceiving, important distinctions, with consequent danger to the reader. Several instances can be found in Chapter II. As to insurable interest, for example, the reader might gain from § 24 the wrong impression that the doctrine arises from the purpose of the parties to make a contract of indemnity — the real explanation, public policy, appearing at the close of the section in a very casual and subordinate way. Unfortunately, the point is of great consequence, for if the doctrine of insurable interest were simply based on the theory of indemnity, the result would merely be that a contract not supported by interest would be valid and that the measure of damages would be reduced to zero, whereas by reason of public policy the contract actually is void. The true doctrine is clearly seen in the inability of the parties to waive the requirement, and also in the extension of the requirement to life insurance policies, notwithstanding the theory that life insurance has nothing to do with indemnity. Again, in § 25 the definition of insurable interest would mislead the beginner by being too sweeping, for it does not indicate that the interest must be an estate or right or liability as to the thing which is the subject matter of the insurance; and the same is true of § 32. In § 40 a beginner would be aided by a clear statement that in the United States Supreme Court the doctrine that a payee must have an insurable interest is upheld by *dicta* only. In the same section it would have been useful to have given some discussion of the Pennsylvania and Texas views. The author's opinion — sound, and well expressed in §§ 44 and 45 — as to the time when insurable interest must exist in marine and fire insurance might well have been repeated in § 46 as to life insurance. In § 49 it might have been well to mention the marine doctrine forbidding recovery for a loss caused by a negligent failure to repair unseaworthiness arising after the attaching of the policy. In § 54 the author's opinion of the leading subrogation case of *Castellain v. Preston* is not explained convincingly, if one recalls the doctrine that a policy of insurance is merely a contract of indemnity. In § 59 it might have been an improvement to indicate in the text that a mortgagee cannot recover more than the damage to the property and that there is a diversity of opinion as to the amount recoverable by a life tenant, together with the reason for the diversity. In § 63 the author fails to distinguish the various kinds of so-called assignment of fire policies, and also fails to explain that the peculiar right in a marine policy of substituting a new insurer proceeds upon the supposed original assent of the underwriter. In § 64 and the following sections the reader would have been aided by a more careful discrimination of the various senses in which it can be contended that a life policy gives to a beneficiary a vested right. In § 73, where is stated the view of some jurisdictions that a creditor should retain under a life policy no more than the amount of his debt, it is not pointed out that the theory is one of collateral security; and the cases cited in the footnote do not support the text, if, as the footnote carefully states, they are cases in which the policy was assigned.

After making these necessary comments upon the sixty-six pages of Chapter II, it is pleasant to be able to add that, taken as a whole, the chapter is useful and that some parts of it, especially §§ 44, 45, 60, 61, and 65-67, distinctly show independent and careful thought.

Grounds for criticism are much less frequent when the reader passes from the first ten chapters, which deal with general principles, to the last eleven chapters, which deal with the meaning and legal effect of the clauses commonly used, for the author is apparently on very familiar ground when he writes of the New York standard fire insurance policy and similar matters.



A TREATISE ON THE FEDERAL CORPORATION TAX LAW OF 1909. By Arthur W. Machen, Jr., Boston. Little, Brown and Company. 1910. pp. xxv, 269.

This volume has undoubtedly proved serviceable to many of the profession in the preparation of corporation tax reports. Its explanations of the different provisions of the Corporation Tax Law are so clear as fully to warrant the author's belief, as expressed in the preface, "that the book is more than a mere 'annotated edition' of the Act of Congress." In addition the book is well indexed, and conveniently arranged appendices contain the text of the law, together with the Treasury Regulations and Forms of Return. The author states the grounds on which the validity of the law will probably be assailed, but refrains from stating a definite opinion as to whether such attacks will be successful.

A. C. B.

SHIPPERS AND CARRIERS OF INTERSTATE FREIGHT. By Edgar Watkins. Chicago: T. H. Flood and Company. 1909. pp. 549.

The author does not profess to cover the general subject of interstate commerce but, to use his language, "The purpose of this work is to treat of the rights and duties of shippers and carriers of freight that comes within the description of interstate commerce." These rights and duties are considered chiefly as arising out of or affected by the Interstate Commerce Act and the amendments thereto including the Elkins law and Hepburn law of 1906. The opening chapter deals with the validity and scope of the Act and is followed by chapters on the reasonableness of rates and the equality in rates. Then come chapters upon the enforcement of the Act by the Interstate Commerce Commission, including rules of procedure and forms, the enforcement by the courts and the power of the courts to prevent an illegal advance in rates. In the next chapter the Act is printed with amendments, section by section, and under each section the decisions of the commission and the courts are collected, the point of each case being succinctly stated in the text. The other chapters deal with state laws and other laws of Congress affecting interstate commerce. In the appendices are printed the Safety Appliance Acts, the Employers' Liability Act, the Arbitration Act, and the Corporation Tax Act. It is hard to see that the last named comes within the scope of the book.

Though the author has limited his purpose as above indicated, the field chosen has already been covered by more comprehensive works on the subject, such as *The Law of Interstate Commerce* by Judson, and *Railroad Rate Regulation* by Beale and Wyman. But the law of interstate commerce is constantly growing, and a book including the recent cases as this one does is useful. The chief criticism is that the author has too often on a given point taken refuge in long quotations from cases and has repeated. For instance, a long quotation in section 94 is the same as that quoted in section 61, and there are other instances. In spite of these defects, the author has produced a practical treatise on the subject. Beside covering the legal side of the questions, he has included quotations from technical works on railroads which should prove helpful alike to lawyers and traffic men. There is a well-arranged index and a table of cases.

R. T. H.

A TREATISE ON THE LAW OF INDEPENDENT CONTRACTORS AND EMPLOYERS' LIABILITY. By Theophilus J. Moll. Cincinnati: The W. H. Anderson Company. 1910. pp. lvi, 378.

This is a book designed to deal primarily with two questions: Who are independent contractors? and What is the liability for their acts of the person who employs them? It does not exhibit the results of much original thought or throw

much new light upon the fundamental problems involved. It is largely made up of quotations from texts and cases, rather loosely strung together, and arranged in the conventional order. As a consequence, there is often much substantial repetition and considerable diversity of statement. To one who wishes to learn what has been said or decided about the subject, the book will prove a useful compendium. The cases seem to be quite fully collected, and every device in the way of collateral citation seems to have been adopted with a view to making them generally available. Very few cases are cited later than the official reports.

F. R. M

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LEADING CASES ON INTERNATIONAL LAW. Part I: PEACE. By Pitt Cobbett. Third Edition. London: Stevens and Haynes. 1909. pp. xxiv, 385.

The first edition of this book appeared in 1885 in one volume and was followed by the second edition, also in one volume, in 1892. The third edition is to be in two parts. The first part of the third edition relating to the international law of peace appeared in 1909 and contains the same number of pages as were devoted to peace, war, and neutrality in the second edition.

In this first part of the third edition the arrangement of material has been much improved. The subject-matter reflects the recent changes in the attitude of courts toward international law. The content of international law has also changed. This is shown in the more extended mention of such subjects as international courts of arbitration, commissions of inquiry, leased territory, spheres of influence, spheres of interests, interoceanic canals, nationals, and insurgency.

The earlier editions of this work, containing comparatively few notes, were designed to furnish illustrative cases for use with text-books. This third edition contains much more extensive notes, there being about three times as many pages of notes as of text of cases. These notes relate not merely to the decision rendered in the case selected, but also to kindred topics; *e. g.*, following a seven-page statement of the Alaska Boundary Arbitration of 1903, there are twelve pages of notes upon the topics, state property in municipal and international law, boundaries of state territory, interests falling short of ownership, occupation, area affected by occupation, abandonment of occupied territory, prescription, other modes of acquisition, leases and pledges of territory, servitudes and restrictive contracts, protectorates, spheres of influence, spheres of interest, the occupation and administration by one state of territory belonging to another. Such a method of treatment makes it necessary to distinguish this work of Dr. Pitt Cobbett from a case book in the proper sense.

It is unfortunate that in international law the influence of early theorists who did not distinguish between the conditions necessary for the existence of a state and the state itself should be perpetuated. There are other political unities beside the state as well as economic and religious unities, and as Cobbett shows, these may often acquire a status in international law. His distinction between "nationals" and "citizens" is of importance for the United States particularly since the acquisition of non-contiguous territory. His treatment of the status of insurgency would have been much more adequate if the principles laid down by the United States Supreme Court in such cases as the *Three Friends* and *Underhill v. Hernandez* had received consideration.

In all the cases, as on page 26, it would have been more satisfactory had the statements been made in the exact words of the opinion so far as possible, rather than in form of a *résumé* of the opinion. This is particularly true when the space occupied would be approximately the same. Possibly such a course would have avoided the statement that the exemption of coast fishing-vessels from capture in time of war was founded on considerations "of the *natural* convenience of belligerent States" (p. 3), when in the case of the *Paquete Habana* and the *Lola* the phrase is "of the *mutual* convenience of belligerent States." While recent in-



stances are very generally cited, one is surprised not to find reference among the others (p. 114) to the Anglo-Japanese Agreements of 1902 and 1905 in regard to the spheres of interest of these states in the Far East.

The reference to Wharton's International Law Digest for many of the American opinions and precedents makes the book less valuable for American readers, because that work has been superseded by the much more complete Moore's International Law Digest.

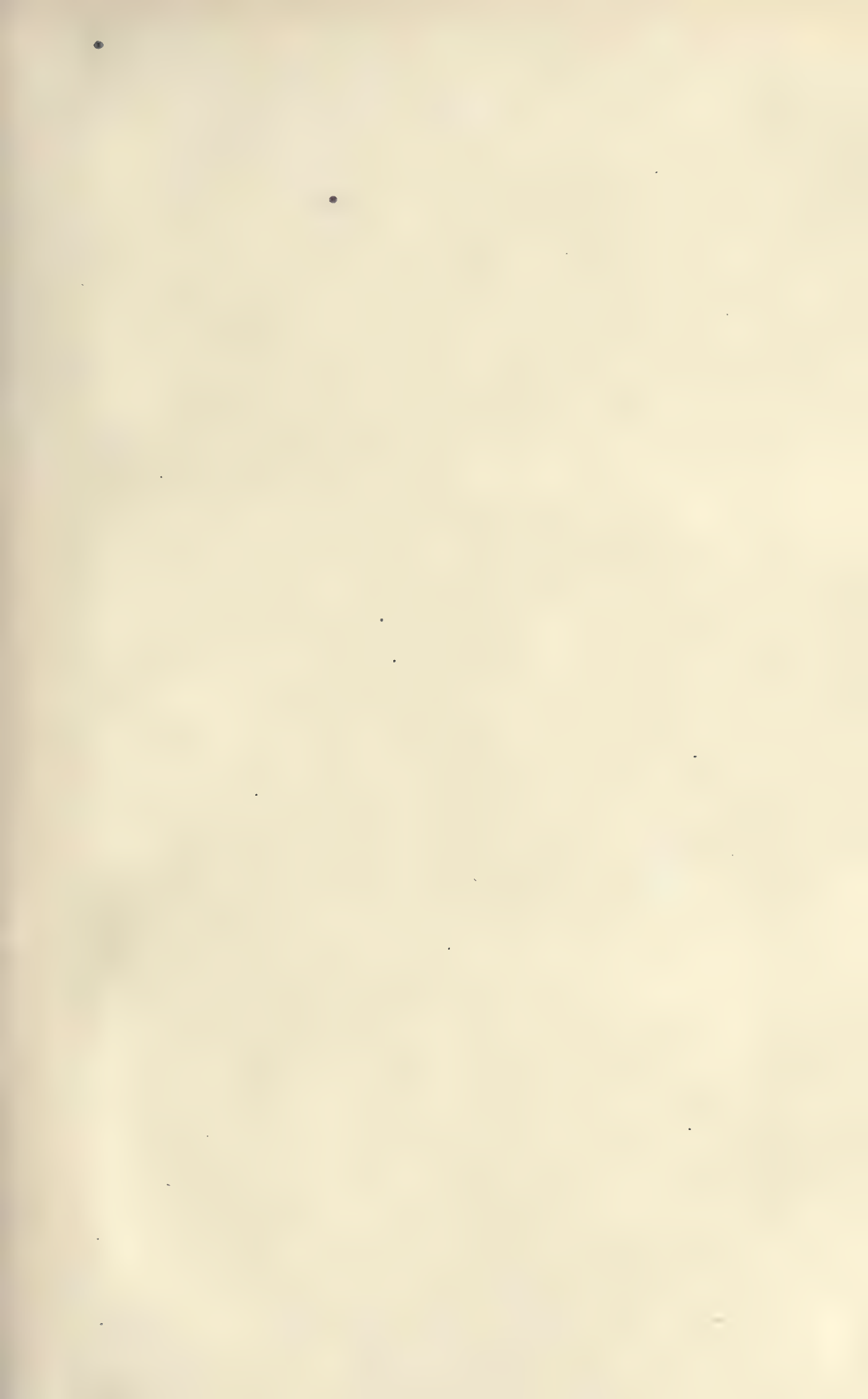
While the title on the back of Dr. Pitt Cobbett's book is "*Leading Cases on International Law*," it should be borne in mind that the title-page gives the real clue to the nature of the book, — "*Cases and Opinions on International Law and various points of English law connected therewith, collected and digested from English and foreign reports, official documents, and other sources, with notes containing the views of the text-writers on the topics referred to, supplementary cases, treaties, and statutes.*"

G. G. W.

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ORIGINAL ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY. By D. J. Medley. London: Methuen and Company. 1910. pp. xi, 397.

THE LAW OF LANDLORD AND TENANT. By Herbert Thorndike Tiffany. In two volumes. St. Paul: The Keefe-Davidson Company. 1910. pp. xxiv, 1255; xxiii, 1256-2343.













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